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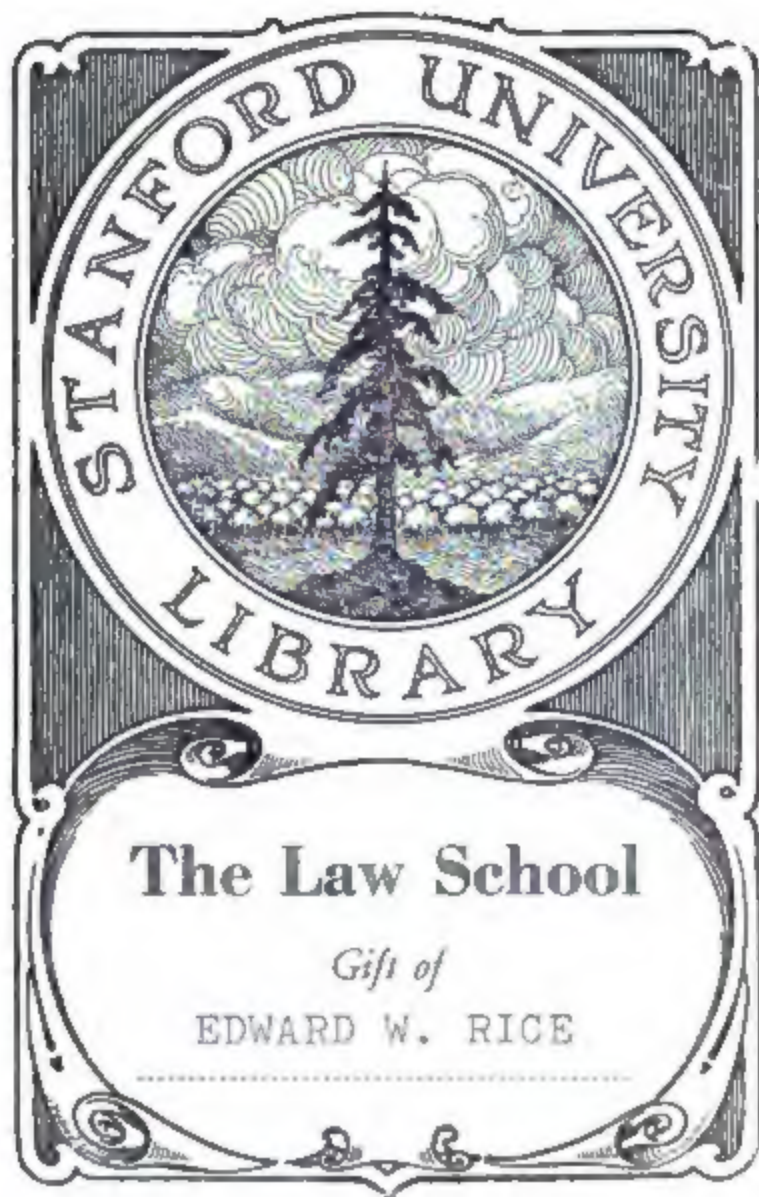
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The Law
OF
LANDLORD AND TENANT

INCLUDING THE
PRACTICE IN EJECTMENT.

BY
JOSEPH HAWORTH REDMAN
AND
GEORGE EDWARD LYON,
OF THE MIDDLE TEMPLE, ESQUIRES, BARRISTERS-AT-LAW.

Fourth Edition

BY
JOSEPH HAWORTH REDMAN.

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PREFACE

TO THE FOURTH EDITION.



FOR all the shortcomings of the present and last Editions I alone am responsible.

To the last Edition my friend Mr. Lyon contributed the carefully-revised Index, which was a portion of his original valuable contribution to the Work, and he also read and corrected the proof sheets as the Edition was passing through the press. Much to my regret and loss, however, he has desired to be relieved from the further burdens of authorship.

Under these circumstances, I wish to express my warmest acknowledgment of gratitude to my friend, Mr. George Humphreys, of the South Eastern Circuit, for valuable assistance rendered to me in connection with this Edition. In addition to revising and, so far as was rendered necessary by new Acts and Rules, re-writing Chapter XI., I am indebted to him for undertaking the laborious task of preparing the Index, for reading the proof sheets of the work, and for other friendly aid, without which the appearance of this Edition would have been longer delayed.

I very much regret the increased bulk of the Work. I can only plead in extenuation that every added paragraph embodies either a statute, a new decision, or a point that

has arisen in daily practice, as to which the former Edition was either silent, or appeared to deal too meagrely. While every Chapter has received substantial additions, Chapter V., which deals with, perhaps, the most important branch of the subject, and Chapter IV., section 2, dealing with "agreements for leases," have been almost entirely re-written.

In its present shape, I believe the Work embodies, with sufficient fulness for daily use, all the statute and case law upon the subject, of practical utility, down to the date of publication. The only important case not noticed in its proper place in the text is *Dougal v. McCarthy*, [1893] 1 Q. B. 736, which was not reported until page 6, the portion of the text affected by it, had passed through the printer's hands.

Upwards of a thousand additional cases have been incorporated in the text. For the tabulation of the cases and statutes I am indebted to the well-known accuracy of Mr. Robert Riches, of the Inns of Court Bar Library, Royal Courts of Justice.

J. H. REDMAN.

2, NEW COURT, LINCOLN'S INN.

July, 1893.

PREFACE

TO THE FIRST EDITION.



QUESTIONS as to the law governing the relationship of landlord and tenant are matters which every lawyer in practice is required to advise upon almost daily. As he is often bound to form and act upon an opinion at once, it is of the greatest importance that he should have at hand the means of informing himself quickly what the law, as modified by statutes or decisions, then is. The Authors, therefore, venture to hope that, in consequence of the recent alterations effected by statutes and by the decisions of the courts in this branch of the law, a new work upon the subject may be acceptable to the public.

They have endeavoured, while avoiding as much as possible merely historical statements of law, to deal concisely with every portion of the subject which is of practical importance and fairly within the scope of a work of this description. Their aim has been to produce a work not too elaborate or bulky to be easily referred to, and not too meagre to be useful when referred to. How far they have succeeded the profession and the public must decide.

5, ESSEX COURT, TEMPLE, E.C.,
June, 1876.

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ADDENDA.



Page 6, insert—"Tenant holding over after expiration of his term.—The judgments in *Dougal v. McCarthy*, [1893] 1 Q. B. 736; 41 W. R. 484, decided while this work was passing through the press, contain an important exposition of the law applicable to the tenancy which arises in the case of a tenant holding over. In *Right v. Darby* (1 T. R. 159), Lord Mansfield said, 'If there be a lease for a year, and by consent of both parties the tenant continue in possession afterwards, the law implies a tacit renovation of the contract. They are supposed to have renewed the old agreement which was to hold for a year.' This was only an *obiter dictum*; and in *Waring v. King* (8 M. & W. 575), Lord Abinger, C. B., expressed his view to be 'that if a party takes premises for a certain time, and holds over, he does not thereby necessarily become tenant from year to year, unless something occurs to show the existence of a new contract.' The something generally relied upon to show the existence of a new contract was payment of rent (*Hyatt v. Griffiths*, 17 Q. B. 505), or an agreement to pay it. The case of *Dougal v. McCarthy* has carried the matter a step further, and has decided that 'if there is the consent of both parties that the tenant shall remain in possession as tenant, and nothing is said to rebut that inference of law, it is by law a tenancy from year to year on the terms of the old tenancy, so far as applicable.' *Per Lord Esher, M.R.*"

„ 32, line 13 from bottom, add—"See *Williams v. Jenkins*, [1893] 1 Ch. 700; 68 L. T. 251."

„ 35, after line 17, add—"The tenant for life, in exercising his power of leasing, must have regard to the interests of all parties entitled under the settlement; and a lease not for the benefit of settled estate, but for the purpose of conferring some benefit on a third person, such as the wife of the tenant for life, will not be supported. (*Sutherland v. Sutherland*, 37 Sol. J. 618.)"

„ 112, lines 7 and 14. *Wallis v. Hands*, also reported [1893] 2 Ch. 75; 41 W. R. 471; 68 L. T. 428.

Page 177, line 8, *add*—"But a hoarding was held not to be a 'building' within the terms of a covenant which contemplated only buildings which could be cemented or stuccoed. (*Foster v. Fraser*, 37 Sol. J. 561; W. N. (1893) 107.)"

„ 182, line 19, *add*—"But where a building was let in flats, the staircase, which was the only means of access to the flats, remaining in the possession and control of the landlord, it was held that there was an implied covenant by the latter to keep the staircase in repair. (*Miller v. Hancock*, 37 Sol. J. 558; 9 Times L. R. 512.)"

„ 184, line 3 from bottom, *add*—"Inherent defects—And where a tenant takes a building of such a kind that by its own inherent nature it would in course of time fall into a particular condition, then the natural consequences of its being in that condition is not a breach of a covenant to repair. (*Lister v. Lane*, 37 Sol. J. 559; 9 Times L. R. 523.)"

„ 185, line 11 from bottom, *add*—"And a house is not out of repair by reason of a few cracks in the plastering or nail holes in the wall. (*Perry v. Chotzner*, 9 Times L. R. 488.)"

„ 198, line 32. *Henderson v. Thorn*, also reported 41 W. R. 509.

„ 256, line 13, *add*—"Smith v. Robinson, [1893] 2 Q. B. 53."

„ 258, line 18, *add*—"Smith v. Robinson, [1893] 2 Q. B. 53."

„ 265, line 28. *London and Westminster Loan Co. v. Lond. & N. W. Ry. Co.*, also reported [1893] 2 Q. B. 49.

„ 349, line 6 from bottom. *Wallis v. Hands*, also reported [1893] 2 Ch. 75; 41 W. R. 471; 68 L. T. 428.

„ 355, line 23, *add*—"Raikes v. Simmons, 95 L. T. Jour. 134."

„ 373, line 5 from bottom. *Lock v. Pearce*, also reported, on appeal, [1893] 3 Ch. 271.

„ 375-6, *insert*—"Where a landlord is proceeding by ejectment to enforce a right of re-entry, an application by an underlessee for a vesting order may be made by counter-claim. (*Warden, &c. of Cholmely's School v. Sewell*, 37 Sol. J. 602; 95 L. T. Jour. 205.)"

„ 445, line 28. *Roberts v. Holland*, also reported [1893] 1 Q. B. 665.

THE LAW OF LANDLORD AND TENANT.

CHAPTER I.

VARIETIES OF TENANCIES.

ACCORDING to the theory of English law, no subject can acquire the absolute ownership of land. Every interest in real estate is held by some tenure. The person possessed of the highest estate known to the law, that of a fee simple, is a "tenant" in fee simple, and "holds" to him and his heirs for ever, the sovereign being the supreme lord. Whoever, therefore, possesses any interest in real estate is, in the eye of the law, a *tenant*; the lands or other possessions he holds are *tenements*, and the manner in which they are held the *tenure*. In dealing with the subject of landlord and tenant, however, we propose only to treat of the incidents of that branch of it which is included in the relationship popularly known as a tenancy—in fact, the hiring of land, houses, and other tenements. The relationship, therefore, which we mean is, that which arises where one person (the landlord) entitled to real estate for any interest or period of duration permits another person (the tenant) for a *less* period to use and enjoy such real estate upon certain conditions, express or implied, and generally including a recompense in the shape of rent or other consideration. Tenures generally.

A tenant, in the limited sense in which we shall use that word, holds either as (1) tenant at sufferance, (2) tenant at will, (3) tenant from year to year, or (4) as lessee for a term of years. Varieties of tenancies.

At sufferance.

A tenancy at sufferance has been defined as the lowest estate which can subsist. It arises where a person has held by a lawful title and continues the possession after his title has determined without either the agreement or disagreement of the person then entitled to the property. (Watk. Conv. 23, n.) Thus, if a tenant for years or his assignee holds over after the expiration of the term (*Butler v. Duckmanton*, Cro. Jac. 169; *Doe v. Beaufort*, 6 Ex. 498, 503), or a tenant from year to year holds over after the determination of the tenancy by notice to quit, or by the death of the lessor who was only tenant for life (*Doe v. Roberts*, 16 M. & W. 780), or a tenant at will holds over after the determination of that estate (*Doe v. Turner*, 7 M. & W. 226; 9 M. & W. 643), in every such case the person so holding over is a tenant at sufferance; so is an undertenant who, being in possession at the determination of the original lease, is permitted by the reversioner to hold over. (*Simpkin v. Ashurst*, 4 Tyrw. 781.) A tenancy at sufferance arises by implication of law, and cannot be created by contract between the parties. (Watk. Conv. 24.) It is an estate which cannot be assigned or conveyed, and is in fact a mere invention of the law to prevent the continuance of possession acting as a trespass. (Smith, L. & T. 31, 2nd ed.) The tenant may be ejected at any time without demand of possession. If the landlord assents to his possession, he becomes tenant at will; if he receives rent, tenant from year to year. (*Doe v. Morse*, 1 B. & Ad. 365.)

At will.

A tenancy at will is an estate determinable at any time at the will either of the landlord or tenant (Co. Litt. 55 a; 16 Ch. D. 274; 50 L. J., Ch. 318); but to create such a tenancy there must be a distinct reservation of a right so to determine it. Thus, "I give you Broadacre to enjoy as long as I please, and to take again when I please," or "to hold henceforth at the will and pleasure of B. at the yearly rent of 25*l.* 4*s.* payable quarterly" (*Doe v. Cox*, 17 L. J., Q. B. 3; 11 Q. B. 122); or if the agreement be to let premises so long as both parties like, reserving a compensation accruing *de die in diem*, and not referable to a year or any aliquot part of a year, in such cases the tenancy is a tenancy at will. (*Richardson v. Langridge*, 4 Taunt. 128.) This estate may either be created by express words, as in the cases above mentioned, or it may arise by implication. It arises in the latter mode whenever a person.

enters or remains in possession of premises with the consent of the landlord, but without having his tenancy secured by an operative lease, and before he pays or agrees to pay rent. A *cestui que trust* who is in actual occupation of the trust property with the consent, or even the mere acquiescence of the trustee, is considered as his tenant at will. (*Garrard v. Tuck*, 8 C. B. 231; 18 L. J., C. P. 338; *Melling v. Leak*, 16 C. B. 652; 24 L. J., C. P. 187.) So is a person who holds rent free by permission of the owner, as in the case of a dissenting minister put into possession by trustees of a congregation (*Doe v. Jones*, 10 B. & C. 718; *Doe v. M'Kaeg*, 10 B. & C. 721; *Collier v. King*, 11 C. B., N. S. 14); or one who enters under an agreement for a purchase or a lease, if he have paid no rent (*per Parke, B.*, *Howard v. Shaw*, 8 M. & W. 118; *Anderson v. Midland Rail. Co.*, 30 L. J., Q. B. 94; *Goodtitle v. Herbert*, 4 T. R. 680; *Coatsworth v. Johnson*, 55 L. J., Q. B. 220; 54 L. T. 520); although in the case of a purchase he may have paid interest. (*Doe v. Chamberlaine*, 5 M. & W. 14; *Howard v. Shaw*, *supra*.) A payment of rent, however, would generally make him tenant from year to year. (*Mann v. Lovejoy*, Ry. & M. 355; and see notes to *Clayton v. Blakey*, 2 Sm. L. C. 118, 9th ed.; and *Richardson v. Langridge*, Tu. L. C. R. P. 11.) Entry under a void lease, until payment of rent, constitutes a person a tenant at will. (*Doe v. Bell*, 5 T. R. 471; 2 Sm. L. C. 110, 9th ed.; and see *infra*, "Tenancy from year to year.") A tenancy at will may be determined by either party, at any time, and without any notice, as by a mere demand of possession by the landlord, though not expressed in formal language (*Doe v. Price*, 9 Bing. 356), or by the tenant quitting. So it will be determined by the death of either party, or by either of them doing any act inconsistent with the continuance of the tenancy (Co. Litt. 55 b; *Turner v. Doe*, 9 M. & W. 646); *e.g.* by the landlord granting a lease (*Hogan v. Hand*, 9 W. R. 673), or executing a conveyance of the premises,—but not until notice thereof reaches the tenant (*Doe v. Thomas*, 6 Ex. 857; 20 L. J., Ex. 367),—or doing any act upon the land for which in the case of any other tenancy he would be liable to an action of trespass (*Turner v. Doe*, *supra*), such as entering on the land without the consent of the tenant, and cutting trees, or getting stone, or putting in his cattle, or the like (*Doe v. Turner*, 7 M. & W. 225); or by the tenant executing an

assignment or underlease of his interest—but not unless the landlord have notice of it (*Pinhorn v. Souster*, 8 Ex. 763; 22 L. J., Ex. 367)—or committing voluntary waste. (Co. Litt. 57 a.)

Tenancy from year to year.

A tenancy from year to year is a term certain for one year from the date of its commencement. (*Legg v. Strudwick*, 2 Salk. 414; *How v. Kennett*, 3 A. & E. 662.) Its distinctive feature is that it can only (in the absence of express stipulation) be determined by half a year's notice to quit, which must expire on a day corresponding with the date of the commencement of the tenancy. At the end of each year, if not determined by proper notice, another year is added to the term. So that if at or before the end of the first half year no proper notice is given, it continues for two years; if at the end of the third half year no notice, then for three years, and so on. Instead of half a year's notice a shorter notice may be stipulated for, and in the case of a tenancy to which the Agricultural Holdings Act, 1883, applies, a year's notice is, in the absence of a written agreement to the contrary, now necessary. (46 & 47 Vict. c. 61, s. 33; *Barlow v. Teal*, 15 Q. B. D. 501; 54 L. J., Q. B. 564.) The notice must always expire at the end of some year from the commencement. In the case of a general letting not expressed to be from year to year, if the tenancy were determinable by notice at some time other than the anniversary of its commencement, it would not be a yearly holding. (*Kemp v. Derrett*, 3 Camp. 510.)

Is assignable.

A tenancy from year to year is assignable (*Allcock v. Moorhouse*, 9 Q. B. D. 366; 30 W. R. 871; *Botting v. Martin*, 1 Camp. 317; and see *Elliott v. Johnson*, L. R., 2 Q. B. 120; 36 L. J., Q. B. 44; *infra*, Chap. X.), differing in this respect from a tenancy at will. It is a *term*, which on the death of the tenant vests in his personal representative until there is some legal determination of it. (*Doe v. Wood*, 14 M. & W. 682; *Doe v. Porter*, 3 T. R. 13; *James v. Dean*, 11 Ves. 393.)

How it arises.

A tenancy from year to year may arise either by an express agreement or lease from year to year, by a general letting, or by implication of law.

(1) *By express contract.*

Where the parties expressly agree upon a tenancy from a given date "from year to year," such a tenancy is created and may be determined by notice at the end of the first or any subsequent year. (*Doe v. Mainby*, 10 Q. B.

473; 16 L. J., Q. B. 303; *Doe v. Smaridge*, 7 Q. B. 957; 14 L. J., Q. B. 327.)

But it is necessary to distinguish those cases in which a term of one year or more is granted in the first instance before the introduction of the words "from year to year." Thus, if land be let "for one year, and so on from year to year," a tenancy not determinable until the end of the second year is created. (*Doe v. Green*, 9 A. & E. 658; *Reg. v. Chaulton*, 1 Q. B. 247; 10 L. J., M. C. 55; *Denn v. Cartright*, 4 East, 31; *Birch v. Wright*, 1 T. R. 380.) A demise for "one year," or for "one year certain" merely, is not a tenancy from year to year, but determines at the end of the first year without any notice to quit. (*Cobb v. Stokes*, 8 East, 358; *Johnstone v. Hudlestone*, 4 B. & C. 937.) Lord Ellenborough expressed an opinion that a tenancy "for twelve months *certain*, and six months' notice afterwards," might be determined by six months' notice expiring at the end of the first year. (*Thompson v. Maberley*, 2 Camp. 573; and see *Langton v. Carleton*, L. R., 9 Ex. 57.) The case was, however, decided on another point, and the dictum has been questioned. (*Doe v. Green*, *supra*; *Gardner v. Ingram*, 61 L. T. 729.)

Whenever a landlord lets property and a tenant takes it without stipulation as to the duration of the tenancy, it is a letting at will; but if the landlord accepts yearly rent, or rent measured by any aliquot part of a year, a letting from year to year arises, such being the construction which the law puts upon such acceptance by the landlord, unless there be some agreement between the parties to the contrary. (*Per Parke, B.*, *Doe v. Wood*, 14 M. & W. 682, 687; *Richardson v. Langridge*, 4 Taunt. 128; *Hunt v. Allgood*, 10 C. B., N. S. 253.) This must be taken as limited to lettings not by deed; for a grant or lease by deed, without limitation as to time, confers on the lessee an estate for his own life, where the lessor is competent to grant such an interest. (Co. Litt. 42 a; *Doe v. Browne*, 8 East, 166; but see *Doe v. Gardener*, 21 L. J., C. P. 222.) Moreover, a general letting for a purpose, extending beyond one year, as the raising of crops not matured in that time, would be enlarged according to the purpose of the letting. (*Roe v. Lees*, 2 W. Bl. 1171.)

A tenancy from year to year arises by implication of law where, without any agreement for letting, or with an

(2) By a general letting.

(3) By implication of law.

(a) In case of tenant holding over.

instrument of letting inoperative to pass any interest in the property, there has been occupation and payment of rent. Payment of rent without any explanation raises the presumption that a tenant at sufferance holding over after the expiration of his lease has become tenant from year to year, the terms of his holding, in the absence of any stipulation to the contrary, being the same as those in his original lease, so far as they are applicable, and this whether the original lease has come to an end by effluxion of time, by the death of the lessor, or determination of his title. (*Kelly v. Patterson*, 43 L. J., C. P. 320; L. R., 9 C. P. 681; *Thomas v. Packer*, 26 L. J., Ex. 207; 1 H. & N. 669; *Hyatt v. Griffiths*, 17 Q. B. 505; *Digby v. Atkinson*, 4 Camp. 275; *James v. Dean*, 11 Ves. 395; *Bishop v. Howard*, 2 B. & C. 100.) The terms on which he holds over are, however, rather matter of evidence than of law (*Mayor of Thetford v. Tyler*, 15 L. J., Q. B. 33; 8 Q. B. 95; *Hyatt v. Griffiths*, *supra*); and if nothing is said as to terms, payment of rent is evidence of an agreement to hold on the original terms (*Roe v. Ward*, 1 H. Bl. 97), even though there has been an assignment of the reversion prior to the holding over (*Wyatt v. Cole*, 36 L. T. 613; and see *Johnson v. St. Peter, Hereford*, 4 A. & E. 520), and notwithstanding the landlord does not in fact know the terms on which the tenant holds, if he could by inquiry have ascertained. (*Kelly v. Patterson*, *supra*, *per* Brett, J.; but see *Oakley v. Monck*, 34 L. J., Ex. 137; 35 L. J., Ex. 87; L. R., 1 Ex. 159, where, however, according to Pigott, B., the landlord had no means of finding out the rejected term.) If there be any dispute as to the terms, it is a matter of fact for a jury. (*Oakley v. Monck*, *supra*.)

Where a tenancy from year to year has determined by a regular notice to quit, the mere accidental detention of the key for a short time after the tenant has removed his goods is not evidence of an intention to continue the tenancy (*Gray v. Bompas*, 11 C. B., N. S. 520); and in cases of holding over the question of intention to renew the tenancy is one of fact. (*Jones v. Shears*, 4 A. & E. 832.)

Terms of expired tenancy applicable in such case.

The following amongst other terms of an expired tenancy would be treated as applicable to a tenancy arising upon a holding over, namely, a covenant to pay rent in advance (*Lee v. Smith*, 9 Ex. 662); a stipulation that the rent should abate in case of damage to the premises by fire (*Bennett v. Ireland*, E. B. & E. 326); a covenant to keep

the premises in repair (*Richardson v. Gifford*, 1 A. & E. 52; *Ecclesiastical Commissioners v. Merral*, L. R., 4 Ex. 162; *Ponsford v. Abbott*, Cab. & E. 225), including the obligation to rebuild in case the premises are burnt down (*Digby v. Atkinson*, 4 Camp. 275); stipulations as to the rotation of crops, and other farming and husbandry covenants (*Doe v. Amey*, 12 A. & E. 476; *Tooker v. Smith*, 1 H. & N. 732; *Roe v. Ward*, 1 H. Bl. 97), including stipulations as to off-going tenant's rights to crops (*Boraston v. Green*, 16 East, 71; and see *Hutton v. Warren*, 1 M. & W. 466); and a stipulation that a tenant shall retain and sow a portion of a farm for his own benefit after the end of the term (*Hyatt v. Griffiths*, 17 Q. B. 505); a covenant not to underlet the premises (*Crawley v. Price*, L. R., 10 Q. B. 302; 23 W. R. 874); a stipulation that the tenancy may be determined "at any time hereafter" on giving six months' notice to quit (*Bridges v. Potts*, 17 C. B., N. S. 314; 33 L. J., C. P. 338); and a proviso for re-entry on non-payment of rent (*Thomas v. Packer*, 1 H. & N. 669; 26 L. J., Ex. 207), or on breach of covenant (*Doe v. Amey*, *supra*; *Crawley v. Price*, *supra*).

On the other hand, a stipulation for a two years' notice to quit (*Tooker v. Smith*, *supra*) is not applicable. It has been questioned whether a stipulation by the tenant to do substantial as distinguished from tenantable repairs is applicable to such a tenancy. (*Doe v. Amey*, 12 A. & E. 479, *per* Lord Denman, C. J.; *Bowes v. Croll*, 6 E. & B. 264, *per* Erle, J.) But it is submitted that the doubt is unfounded (*Digby v. Atkinson*, 4 Camp. 275), since the terms of the holding over are not confined to such terms as are necessarily incident to a yearly tenancy, but include such terms as *may be* incident thereto. (*Hyatt v. Griffiths*, 17 Q. B. 505.) A covenant to put the premises in the same state of repair at the end of the term as they were in at the commencement would, in an action on the implied contract arising out of the new tenancy from year to year, be held to mean the state of repair they were in at the commencement of the holding over; though the tenant would be liable, if sued upon the actual covenant in the original lease for the breach existing at the end of the term, to put them into the state of repair in which they were at the commencement of the term. (*Johnson v. St. Peter, Hereford*, 4 A. & E. 520.)

A number of the above cases have been decided with

reference to a yearly tenancy arising upon possession taken under a void lease or an agreement for a lease; but the rule is the same. (*Thomas v. Packer*, 1 H. & N. 669, *per* Watson, B.)

Where some of the terms of the tenancy are expressly varied, the remaining terms will be taken to apply, as where the rent is altered in amount. (*Digby v. Atkinson*, 4 Camp. 275.)

(b) On entering under an in-operative contract for letting,

If the parties have expressly agreed for a tenancy at will, payment of rent in whatever manner will not change it to one from year to year. (*Doe v. Cox*, 11 Q. B. 122; 17 L. J., Q. B. 3; *Doe v. Davies*, 21 L. J., Ex. 60; 7 Ex. 89.) But where the tenancy at will arises by implication of law, and not by contract, payment of rent will convert it into one from year to year. Formerly, where a person was let into possession under a mere agreement for a lease or a void lease, *e.g.*, a lease for more than three years not under seal, and paid or agreed to pay any part of the annual rent, the tenant had in equity an estate according to the instrument (*Parker v. Taswell*, 2 De G. & J. 559; 27 L. J., Ch. 812); but at common law his position was merely that of a tenant from year to year upon all the terms of the instrument which were not inconsistent with such a tenancy. (*Martin v. Smith*, L. R., 9 Ex. 50; 43 L. J., Ex. 42; *Doe v. Bell*, 2 Sm. L. C. 110, 9th ed.; *Clayton v. Blakey*, *ib.* 118; *Lee v. Smith*, 23 L. J., Ex. 198; *Tress v. Savage*, 4 E. & B. 36; 23 L. J., Q. B. 339; *Bennett v. Ireland*, 28 L. J., Q. B. 48; *Beale v. Sanders*, 3 Bing. N. C. 850; *Richardson v. Gifford*, 1 A. & E. 52; *Berrey v. Lindley*, 3 M. & G. 498; *Knight v. Benett*, 3 Bing. 361; *Chapman v. Towner*, 6 M. & W. 100; *Doe v. Amey*, 12 A. & E. 476; *Hamerton v. Stead*, 3 B. & C. 478; *Braythwaite v. Hitchcock*, 10 M. & W. 494.) In the case of *Walsh v. Lonsdale* (21 Ch. D. 9; 52 L. J., Ch. 2; 46 L. T. 858), decided in 1882, the Court of Appeal, dealing with the above class of cases, held that a tenant in possession, under an agreement for a lease of which the Court would decree specific performance, has no longer *two* estates—one a legal tenancy from year to year, and the other an equitable tenancy under the agreement—but is in the same position as if a lease in the terms of the agreement had been granted. (*Swain v. Ayres*, 21 Q. B. D. 289; 57 L. J., Q. B. 428; *Lowther v. Heaver*, 41 Ch. D. 248; 58 L. J., Ch. 482.) Where, however, the agree-

ment is one of which the Court would not decree specific performance, the old rule still prevails, and until payment of rent the tenancy is one at will, and afterwards from year to year. (*Coatsworth v. Johnson*, 55 L. J., Q. B. 220; 54 L. T. 520.)

In any case, however, should the relationship of landlord and tenant be permitted to continue during the term contemplated by the inoperative instrument, it will then cease without notice to quit, as if the term had in fact been created. (*Doe v. Stratton*, 4 Bing. 446; *Tress v. Savage*, *supra*.) And the tenant, having had the full benefit which he could have enjoyed under the lease, the stipulations entered into by him in respect of the property will be enforced against him, *e.g.*, the undertaking to leave in repair (*Pistor v. Cater*, 9 M. & W. 315; *Beale v. Sanders*, 3 Bing. N. C. 850), to paint in the last year of the term (*Martin v. Smith*, L. R., 9 Ex. 50; 43 L. J., Ex. 42), or to leave a certain stock of game (*Adams v. Clutterbuck*, 10 Q. B. D. 403; 52 L. J., Q. B. 607). On the other hand, he will be entitled to the benefit of the stipulations as to off-going tenants' rights. (*Brocklington v. Saunders*, 13 W. R. 46.) It is immaterial that the agreement for the lease was subject to a condition which has not been fulfilled. (*Pistor v. Cater*, 9 M. & W. 315.)

If a person who enters under an agreement for a purchase which goes off, pays rent, he will generally become tenant from year to year. (*Saunders v. Musgrave*, 6 B. & C. 524; *Clayton v. Blakey*, 2 Sm. L. C. 118, 9th ed.)

(c) or entry upon a purchase which goes off.

Payment of rent in these cases raises a tenancy by implication, but actual payment of rent is not necessary; it is sufficient if the tenant either agrees to pay it, or admits that it is due. (*Cor v. Bent*, 5 Bing. 185; and see *Vincent v. Godson*, 24 L. J., Ch. 121.)

Implication by payment or admission of rent:

The presumption arising from the acceptance of rent is the same in the case of a corporation landlord as in that of a private individual, so that a parol lease by a corporation after receipt of rent creates a tenancy from year to year. (*Ecclesiastical Commissioners v. Merral*, L. R., 4 Ex. 162; 38 L. J., Ex. 93; *Doe v. Tanriere*, 12 Q. B. 998; 18 L. J., Q. B. 49; *Wood v. Tate*, 2 B. & P., N. R. 247.) Occupation and payment of rent will not, however, render a corporation tenant from year to year, but only liable for use and occupation during the actual period of occupation.

in case of corporations.

(*Finlay v. Bristol and Exeter Rail. Co.*, 21 L. J., Ex. 117; 7 Ex. 409.)

Mere occupation will not create.

But where there has been no rent paid, and no circumstances from which a tenancy can be implied, mere occupation will not make the occupier a tenant from year to year. (*Doe v. Pullen*, 2 Bing. N. C. 749.) Thus, where there was a negotiation for a letting, and the agreement was drawn and approved of by the tenant, but he was to find a surety, and he neither found the surety nor executed the agreement, it was held that there was no implied tenancy. (*Doe v. Cartwright*, 3 B. & Ald. 326.) And so in the case of one who entered without leave, and afterwards there was a treaty for a lease, upon the terms of which the parties disagreed. (*Doe v. Quigley*, 2 Camp. 505; and see *Dawes v. Dowling*, 22 W. R. 770.)

Implication from payment of rent not conclusive.

Payment and receipt of rent do not actually create a tenancy from year to year. (*Finlay v. Bristol and Exeter Rail. Co.*, 21 L. J., Ex. 117; 7 Ex. 409.) Receipt of rent is evidence of a tenancy of some kind. If no other tenancy appear, the law implies that it is from year to year. (*Roe v. Prideaux*, 10 East, 187; *Doe v. Watts*, 7 T. R. 85.) This can, however, be rebutted by surrounding circumstances (*Smith v. Widlake*, 47 L. J., C. P. 282; 26 W. R. 52), and it is competent for either receiver or payer of rent to prove the circumstances under which the payments were made, and by such circumstances to repel the legal implication which would result from the receipt of rent unexplained. (*Doe v. Crago*, 6 C. B. 90; 17 L. J., C. P. 263.) Thus, where a landlord has received rent from a tenant holding over, he may show that the rent was received in ignorance of the fact of the determination of the old tenancy (*ibid.*); and in a later case the receipt, under a mistake, of rent of an inadequate amount, and described as "chief rent," purporting to be paid under an invalid lease, was held not to constitute a tenancy from year to year. (*Smith v. Widlake*, 47 L. J., C. P. 282; 26 W. R. 52.) And the law will not infer the relationship of landlord and tenant if, looking to all the circumstances of the case, it appear that it was not the intention of the parties to create that relationship, notwithstanding the payment is described as rent. (*Camden v. Batterbury*, 7 C. B., N. S. 864; 28 L. J., C. P. 335; *Williams v. Bartholomew*, 1 B. & P. 326.)

Tenancies for

If an annual rent is reserved, the holding is from year

to year, although the contract of demise provides that the tenant shall quit at a quarter's notice, provided that notice is to expire at the same time of the year as the tenancy commenced. If it is agreed that it may be determined *at any time*, on six or three months' notice, that creates a half-yearly or quarterly tenancy, as the case may be (*Doe v. Grafton*, 21 L. J., Q. B. 276; *Kemp v. Derrett*, 3 Camp. 510); if on one month's notice, then a monthly tenancy. (*Doe v. Gower*, 17 Q. B. 589; 21 L. J., Q. B. 57).

Tenancies for less than a year most frequently occur in the case of lodgings. A lodger tenant is a person who is entitled to the exclusive possession of an *inner* room or rooms in the house of another person, the dominion over the building generally, including the outer door and approaches to such inner room, being vested in the landlord. (*Monks v. Dykes*, 4 M. & W. 567; and see *Bradley v. Baylis*, 51 L. J., Q. B. 183; 8 Q. B. D. 210; *Ancketill v. Baylis*, 10 Q. B. D. 577; 48 L. T. 342.) A lodger tenant is distinguishable, on the one hand, from a person, commonly called a lodger, who merely contracts with a boarding-house keeper for food and shelter, but not for the exclusive possession of any particular room, though a separate sleeping room may be assigned to him, and who is merely in the position of a guest at an inn and not of a tenant (*Wright v. Stavart*, 29 L. J., Q. B. 161; 2 E. & E. 721; *Lane v. Dixon*, 3 C. B. 784, *per* Maule, J.); and, on the other hand, from a person who has the exclusive occupation of rooms in a house as an ordinary tenant. Of the latter class is the occupation of chambers, flats, or any building in which what was originally one house becomes divided into separate tenements, and there is a distinct outer door to each holding opening upon a common staircase, each holding being considered in the light of a separate dwelling-house. (*Lee v. Gansel*, Cowp. 8; *Tracy v. Talbot*, 6 Mod. 214; *Bradley v. Baylis*, *supra*, *per* Brett, L. J.) A lodger tenant is entitled, as part of his holding, to the use of everything which is incident to the proper enjoyment of the lodgings, as the street-door bell, knocker, skylight on the staircase and water-closet. (*Underwood v. Burrows*, 7 C. & P. 28.) He is in the same position as an ordinary tenant, and the landlord may distrain his goods for rent (*Newman v. Anderton*, 2 B. & P., N. R. 224; *Cook v. Humber*, 31 L. J., C. P. 73, 76; 11 C. B., N. S. 33); and he can maintain an action against the landlord for

What notice to quit necessary where tenancy for less than a yearly one.

trespass. (*Lane v. Dixon*, 3 C. B. 781; 16 L. J., C. P. 129.) He differs from an ordinary tenant in that the usages with respect to notices to quit in the case of yearly tenants do not apply to his tenancy. (*Wilson v. Abbott*, 3 B. & C. 88; *Adams, Eject.* 101.) Indeed, the question generally as to what notice is necessary to determine a shorter tenancy than a yearly one is not free from doubt. Though in the case of a quarterly tenancy a quarter's notice seems requisite (*Kemp v. Derrett*, 3 Camp. 510; *Towne v. Campbell*, 3 C. B. 921, *per* Coltman, J.), in the case of a monthly or weekly tenancy a reasonable notice is necessary (*Jones v. Mills*, 31 L. J., C. P. 66; 10 C. B., N. S. 788); but it is not necessarily commensurate with the period of letting. (*Huffell v. Armitstead*, 7 C. & P. 56.) Custom or local usage would be evidence of what was a reasonable notice. "A tenant," said Parke, B., in the last-cited case, "who enters upon a fresh week may be bound to continue until the expiration of that week, or to pay the week's rent, but this is a very different thing from giving a week's notice to quit. The proposition contended for is this, that if a tenant commences a new week without giving notice, he is to be considered as contracting to hold not only for that week, but also for the following week. I am of opinion, in the absence of any evidence to prove a usage to that effect, that, in point of law, a week's notice to quit is not implied as a part of the contract in the case of an ordinary weekly taking." (And see *Sandford v. Clarke*, 21 Q. B. D. 398; 57 L. J., Q. B. 507.)

Occupation of servant not a tenancy.

There are occupations which, from the conditions under which the occupations occur, do not create a tenancy. Thus a coachman placed in rooms of his master over the stable, the gardener who is put into a house in the garden, or the porter who occupies the lodge at a park gate, do not occupy as tenants, but as servants merely (*Dobson v. Jones*, 5 M. & G. 112; 13 L. J., C. P. 126, *per* Tindal, C. J.); and any workman, servant, agent, or government or other official who is *required* as part of his contract of service to occupy a house belonging to his master or principal for the more convenient performance of his duties, whether or not with less wages on that account, is not a tenant, and acquires no estate in the house, though he use it to carry on his own business. (*Dobson v. Jones*, *supra*; *Hughes v. Overseers of Chatham*, 5 M. & G. 54; 13 L. J., C. P. 44; *Doe v. Derry*, 9 C. & P. 494; *White v. Bayley*, 10 C. B., N. S. 227; 30

L. J., C. P. 253; *Bertie v. Beaumont*, 16 East, 33; *Mayhew v. Suttle*, 23 L. J., Q. B. 372; 24 *ib.* 54; *Fox v. Dalby*, L. R., 10 C. P. 285.) Such an occupation is on the footing of that of a servant occupying a room in his master's house—the occupation is that of the master by his servant; the right to occupy is divested immediately the service is determined, no notice to quit or proceedings in ejectment being necessary to evict the servant. (*Rex v. Cheshunt*, 1 B. & Ald. 473; *Rex v. Kelstern*, 5 M. & S. 136.) And as he takes no estate he cannot maintain an action for trespass against the master for entering and evicting him. (*White v. Bayley*, *supra*.)

The Agricultural Holdings Act, 1883, recognizing the rule that occupation for the mere purpose of service does not create a tenancy, enacts that nothing in that Act shall apply to any holding let to the tenant during his continuance in any office, appointment, or employment held under the landlord. (46 & 47 Vict. c. 61, s. 54.)

But there is no inconsistency in the relation of master and servant with that of landlord and tenant (*Hughes v. Overseers of Chatham*, *supra*, per Tindal, C. J.), and if servants or officials are *permitted* to occupy a house, either as part remuneration or for the more convenient performance of their services, they are tenants. If the stipulation is that the occupation shall cease with the service, it is a tenancy at will. (*Smith v. Overseers of Seghill*, L. R., 10 Q. B. 422; 44 L. J., M. C. 114; 32 L. T. 859.)

The nature of the tenancy created by an attornment clause in a mortgage deed has been the subject of conflicting decisions, ranging from *Walker v. Giles* (6 C. B. 662; 18 L. J., C. P. 323), in which it was held to create no tenancy, to *Kearsley v. Philips* (52 L. J., Q. B. 581; 11 Q. B. D. 621), in which it was held that the ordinary relation of landlord and tenant is thereby created. Tenancy by attornment.

An attornment is simply an agreement or consent of a tenant to become such to a new lord. By the old feudal law it was necessary to the alienation of the seigniorship or reversion that the tenant should consent to the alienation, or rather consent to become the tenant of the new lord. (Co. Litt. 309 a.) This consent was called an attornment. An attornment was rendered unnecessary by 4 Anne, c. 16, which enacted that all grants and conveyances of any manors or rents, or of the reversion or remainder of any messuages or lands, should be good and effectual without

any attornment of the tenants of any such manors or of the land out of which such rent should be issuing, or of the particular tenants upon whose particular estates any such reversions or remainders should be expectant or depending, as if their attornment had been made (sect. 9); provided that no such tenant should be prejudiced or damaged by payment of rent to any such grantor, or by breach of any condition, or for non-payment of rent, before notice given to him of such grant by the grantee. (Sect. 10.) The efficacy of fraudulent attornments was also put an end to by 11 Geo. 2, c. 19, s. 11, which enacted that the attornment of tenants to strangers claiming title to the estate of their landlords should be absolutely null and void to all intents and purposes whatsoever, and that the possession of their respective landlord or landlords, lessor or lessors, should not be deemed or construed to be anywise changed, altered, or affected by such attornment or attornments: provided that nothing therein contained should extend to vacate or affect any attornment made pursuant to and in consequence of some judgment at law, or decree, or order of a Court of equity, or made with the privity and consent of the landlord or landlords, lessor or lessors, or to any mortgagee after the mortgage is become forfeited.

The effect of these two statutes was to almost put an end to attornments, until the modern practice arose of inserting an attornment clause in mortgage deeds, whereby the mortgagor attorns tenant of the mortgaged property to the mortgagee. This peculiar tenancy has been spoken of as a legal fiction to effectuate the intention of the parties, and a mortgagor may attorn tenant to successive mortgagees. (*Ex parte Punnett, Re Kitchen*, 16 Ch. D. 226; 50 L. J., Ch. 212.) In *Morton v. Woods* (L. R., 4 Q. B. 293; 38 L. J., Q. B. 81) it was defined as a tenancy at will, but in a later case, where the mortgagor attorned tenant from year to year, with a proviso enabling the mortgagee at any time after a given date, and without previous notice, to enter upon and take possession of the premises and determine the tenancy, it was held that the attornment clause created a tenancy from year to year but determinable at the will of the mortgagee. (*Re Threlfall, Ex parte Queen's Benefit Building Society*, 16 Ch. D. 274; 50 L. J., Ch. 318; *Ex parte Voisey, Re Knight*, 21 Ch. D. 442; 52 L. J., Ch. 121.)

An attornment at a rent puts the parties in the same position as if the ordinary relation of landlord and tenant existed, so that, subject to the provisions of the Bills of Sale Acts, *infra*, p. 16, the mortgagee can distrain the goods of third parties upon the premises (*Kearsley v. Philips*, 11 Q. B. D. 621; 52 L. J., Q. B. 581; *Re Stockton Iron Furnace Co.*, 48 L. J., Ch. 417; 10 Ch. D. 335; *Jolly v. Arbuthnot*, 28 L. J., Ch. 547; 4 De G. & J. 224; *West v. Fritch*, 18 L. J., Ex. 50; 3 Ex. 216); and an action by the mortgagee for the recovery of the possession of the land under an attornment clause is an action for the recovery of land by a landlord against a tenant within R. S. C. 1883, Ord. III. r. 6, and one to which Ord. XIV. applies. (*Daubus v. Lavington*, 53 L. J., Q. B. 283; 13 Q. B. D. 347; *Hall v. Comfort*, 18 Q. B. D. 11; 56 L. J., Q. B. 185; *Mumford v. Collier*, 25 Q. B. D. 275; 38 W. R. 716; *post*, Chap. XI.) But an attornment does not alter the equitable relation of mortgagor and mortgagee, a fact which has to be taken into consideration in determining the terms to be imposed upon a trustee in bankruptcy of the mortgagor who applies for leave to disclaim the tenancy. (*Ex parte Isherwood, Re Knight*, 22 Ch. D. 384; 52 L. J., Ch. 370.) Neither does it constitute the mortgagee a mortgagee in possession until proceedings have been taken under it. (*Stanley v. Grundy*, 52 L. J., Ch. 248; 22 Ch. D. 478; but see *Re Stockton Iron Furnace Co.*, 48 L. J., Ch. 417, *per James*, L. J.)

Where the attornment clause ran as follows:—"For better securing the interest the mortgagors do hereby attorn and become tenants of the premises to the mortgagee, at the yearly rent of 40*l.*, payable half-yearly, so long as the principal sum shall remain secured," it was held that the mortgage constituted the relationship of landlord and tenant from its date, notwithstanding the receipts for the half-yearly payments were given "for interest." (*West v. Fritch*, 18 L. J., Ex. 50; 3 Ex. 216.) But where the stipulation ran, that upon default of certain payments "then immediately or at any time after such default shall have been made the mortgagor will hold the premises as yearly tenant to the mortgagees," it was held that, notwithstanding default made in the payments, the mortgagees were not entitled to treat the mortgagor as a tenant, and distrain his goods, without notice of their intention to alter the relationship from that of mortgagor and mort-

Attornment
need not be
executed by
mortgagee,
or stamped as
a lease.

gagee to that of tenant and landlord. (*Clowes v. Hughes*, 39 L. J., Ex. 62; L. R., 5 Ex. 160.)

It is not necessary to the validity of an attornment clause that the mortgage deed should be executed by the mortgagee. (*Ex parte Voisey, Re Knight*, 21 Ch. D. 442; 52 L. J., Ch. 121.) Neither does it require to be stamped as a lease in addition to the mortgage stamp. (*Walker v. Giles*, 18 L. J., C. P. 323; 6 C. B. 662.) Instruments executed before 1st of January, 1879, containing an attornment clause, are not within the Bills of Sale Acts so as to require registration (*Morton v. Woods*, L. R., 4 Q. B. 293; 38 L. J., Q. B. 81; *Re Stockton Iron Furnace Co.*, 48 L. J., Ch. 417; 10 Ch. D. 417); those executed after that date, if they reserve a rent for the purposes of the security, are, for they "shall be deemed to be" bills of sale. (41 & 42 Vict. c. 31, s. 6; 45 & 46 Vict. c. 43, s. 3.) But inasmuch as an attornment cannot possibly be expressed in the form in the schedule to the Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), that Act would at first sight appear to invalidate all attornment clauses in mortgages executed after 1st November, 1882. (*Re Townsend, Ex parte Parsons*, 16 Q. B. D. 532; 55 L. J., Q. B. 137; *Ex parte Kennedy, Re Willis*, 21 Q. B. D. 384; 57 L. J., Q. B. 634.) The result of the authorities, however, is that an unregistered attornment clause, although void so far as it purports to confer on the mortgagee a power of distress over personal chattels, is nevertheless effectual to create the relation of landlord and tenant between the parties, so that the mortgagee is entitled to give notice to quit and recover possession summarily as a landlord. (*Mumford v. Collier*, 25 Q. B. D. 279; 38 W. R. 716.) Moreover, as it is only to be "deemed to be a bill of sale," and is not a bill of sale, an attornment clause conferring a power of distress may be made good by registration, although it cannot be in the statutory form. (*Green v. Marsh*, [1892] 2 Q. B. 330; 61 L. J., Q. B. 442.)

Occupations
of vendor
and pur-
chaser.

If a person sells and conveys property, and remains in possession of it without any agreement, he is not a tenant but a wrongdoer. He may be ejected, and is liable in trespass for mesne profits. (*Tew v. Jones*, 13 M. & W. 12.) If he remains in possession by agreement, the terms of the agreement speak for themselves (*ibid.*); and under an agreement that the purchaser should receive all rents and

profits from the date fixed for completion, the purchaser was held entitled to a fair occupation rent as from that date from the vendor who remained in possession. (*Metropolitan Rail. Co. v. Defries*, 2 Q. B. D. 189, 387; 36 L. T. 494; *Sherwin v. Shakspear*, 5 De G. M. & G. 517.)

If the purchaser is let into possession under an agreement for purchase which goes off through defects in the title, although he occupies as tenant at will (*Doe v. Chamberlaine*, 5 M. & W. 14; *ante*, p. 3), yet as the very nature of the transaction negatives an implied contract to pay for the occupation, he cannot be sued for use and occupation, even though the occupation may have been a beneficial one. (*Winterbottom v. Ingham*, 7 Q. B. 611; 14 L. J., Q. B. 298; *Corrigan v. Woods*, Ir. R., 1 C. L. 73; 15 W. R. 318.) But if he remain in possession after the contract has gone off, he becomes liable for subsequent use and occupation (*Howard v. Shaw*, 8 M. & W. 118), and by agreement rent may be recoverable as from the commencement of the occupation.

A demise for years is a contract for the exclusive possession and profits of lands and tenements for some determinate period, whereby the lessor lets them to the lessee for a certain term of years agreed upon between the parties, and thereupon the lessee enters. Such an estate is denominated a *term*, which word signifies not only the limitation of time, but the estate and interest that pass for such time. (Co. Litt. 45 b.) Lease for years.

A lease in perpetuity is unknown to the common law, and cannot be created except by statute, but there may be a lease for any number of years or the grant of a fee simple subject to a rentcharge. (*Sevenoaks, &c. Rail. Co. v. London, Chatham and Dover Rail. Co.*, 11 Ch. D. 635; 48 L. J., Ch. 513.) Under the Settled Land Act, 1882, a tenant for life, with the authority of the Court, may grant leases for building or mining purposes in perpetuity. (45 & 46 Vict. c. 39, s. 10; and see 53 & 54 Vict. c. 69, s. 9.) Lease in perpetuity.

A lease for years often contains a proviso enabling the tenant to purchase the property, and such a proviso is valid if it does not infringe the rule against perpetuities, that is, if the option is to be exercised within twenty-one years from the date of the lease, or within a life or lives then in being and twenty-one years after. (*London and South Western Rail. Co. v. Gomm*, 20 Ch. D. 652; 51 Lease with option to purchase.

L. J., Ch. 530; *Dunn v. Flood*, 25 Ch. D. 629; 53 L. J., Ch. 537; and see *Trevelyan v. Trevelyan*, 53 L. T. 853.) Conditions attached to the option must be strictly complied with, and where the option is to be exercised within a given time, then time is of the essence of the contract. (*Ranelagh v. Melton*, 34 L. J., Ch. 227; 2 Dr. & Sm. 278; *Weston v. Collins*, 34 L. J., Ch. 353; *Brooke v. Garrod*, 27 L. J., Ch. 226; 2 K. & J. 608; *Riddell v. Durnford*, W. N. (1893) 30.) Where a lessee had an option to purchase during the term upon giving notice in writing to the three lessors or the survivors of them, it was held that a notice to one of the lessors, the other two being still alive, was insufficient. (*Sutcliffe v. Wardle*, 63 L. T. 329.) The option is generally to be exercised during the continuance of the tenancy, though the continuance of the tenancy and the option may be independent. Thus, where the owner of a plot of land agreed to grant a lease of it to A. B. as soon as the latter had erected a house on it, with a proviso for re-entry in the event of A. B. not performing the stipulations therein on his part contained, and an option to A. B. to purchase the fee within two years; it was held that the option to purchase subsisted notwithstanding A. B. had committed a forfeiture. (*Green v. Low*, 22 Beav. 625.)

Neither trustees (*Clay v. Rufford*, 5 De G. & Sm. 768; but see *Re Female Orphan Asylum*, 15 W. R. 1056), nor executors, or administrators (*Oceanic Steam Navigation Co. v. Sutherland*, 16 Ch. D. 236; 50 L. J., Ch. 308), can grant a lease with an option for the lessee to purchase at a fixed price.

A building lease, or agreement for a building lease, under the Settled Land Acts, may contain an option to purchase, provided it is to be exercised within 10 years (52 & 53 Vict. c. 36, s. 2); and the power to give an option of purchase is sometimes contained in a settlement. (See *Re Hallett to Martin*, 24 Ch. D. 624; 52 L. J., Ch. 804.)

If exercised,
operates as a
conversion.

If the option be exercised after the landlord's death, it relates back to the date of the lease, operating as a conversion from that date, so as to make the purchase-money form part of the landlord's personal estate. (*Lawes v. Bennett*, 1 Cox, 167; *Townley v. Bedwell*, 14 Ves. 591; *Collingwood v. Row*, 26 L. J., Ch. 649; 5 W. R. 484.) But there is no conversion as between the landlord and tenant from any date earlier than the exercise of the option, a point which was decided on a claim by the tenant for the insurance money of the premises, which had been destroyed

before the exercise of the option. (*Edwards v. West*, 26 W. R. 507; 7 Ch. D. 858; 47 L. J., Ch. 463.) In the case of the tenant, the option to purchase passes with the lease as part of his personal estate, and if the option is not exercised until after his death it has no retrospective operation. (*Re Adams and Kensington Vestry*, 24 Ch. D. 199; 51 L. T. 382; 54 L. J., Ch. 87.)

Inasmuch as, in the absence of express provision in the contract, a purchaser of real estate is not entitled to the benefit of a policy of insurance, although the premises be burnt down between the date of the contract and completion (*Poole v. Adams*, 33 L. J., Ch. 639), neither is a lessee with an option to purchase, upon exercising his option, so entitled. (*Edwards v. West*, 47 L. J., Ch. 463; 7 Ch. D. 858.) But where a lessee, with an option to purchase, in pursuance of a covenant in the lease, insured the premises, which were also insured by the lessor without the lessee's knowledge in a different office, and upon the premises being burnt down the loss was apportioned between the two offices, it was held, upon the lessee electing to purchase, that the insurance money received by the lessor should be taken as part of the purchase-money. (*Reynard v. Arnold*, 23 W. R. 804; L. R., 10 Ch. 386.) In that case, however, it will be observed, the lessor had by his own act diminished the sum which the lessee would otherwise have received. (*Edwards v. West*, *supra*.) And the insurance company is in every case entitled to have the purchase-money brought into account in diminution of the loss against which they insured. (*Castellain v. Preston*, 11 Q. B. D. 380; 52 L. J., Q. B. 366.)

Title to insurance moneys under lease with option to purchase.

Sometimes a lease contains an option to the lessee to take a lease for a further term. Where there is no limitation of time within which it is to be exercised, the option may be exercised at any time during the continuance of the tenancy, though after the expiration of the term of years first created (*Buckland v. Papillon*, L. R., 2 Ch. 67; 36 L. J., Ch. 81; *Moss v. Barton*, L. R., 1 Eq. 474); and where premises were let from year to year with an option to the tenant of taking a lease for a term, he was held not to have waived the option by declining to take a lease when asked so to do, no step having been taken to determine the yearly tenancy upon such refusal. (*Hersey v. Giblett*, 23 L. J., Ch. 818; 18 Beav. 174.) This option is an interest in the land capable of assignment, and upon the bankruptcy

Lease with option to take further term.

of the tenant would pass to his trustee. (*Buckland v. Papillon, supra.*)

Renewable
leases.

Another form of the same kind of option is the covenant for renewal sometimes inserted in leases. (2 Platt, Leases, 703 *et seq.*) Such covenants are of two kinds: namely, to grant another lease of the thing demised, and for perpetual renewal. The chief difficulty in construing such covenants is to determine whether or not the covenant is one for perpetual renewal, that is to say, whether upon the grant of a new lease the lessee is entitled to the insertion of a covenant for renewal similar in terms to that contained in the original lease, or whether the covenant for renewal extends only to a second lease, and not to a perpetuity of leases. It was formerly considered that there was a presumption against the right to a perpetual renewal, but this is now only recognized to the extent that the party claiming this perpetual interest has the onus cast upon him of showing with reasonable clearness from the terms of the deed that the covenant he relies on was intended by the parties to be a covenant for perpetual renewal. (*Swinburne v. Milburn*, 54 L. J., Q. B. 6; 9 App. Cas. 844; 33 W. R. 325.) A covenant to grant a new lease subject to "all the covenants contained in the old lease," has been held to mean exclusive of the covenant for renewal (*Iggulden v. May*, 7 East, 237; 9 Ves. 325; 2 Platt, 724); while the addition of the words "including this present covenant," will entitle the lessee to a perpetual renewal. (*Hare v. Burges*, 27 L. J., Ch. 86; 4 K. & J. 45; and see *Ex parte Clarke*, I. R., 6 Eq. 51; *Swinburne v. Milburn, supra.*)

The right to a renewal may be forfeited by the tenant not applying for a renewal within the time mentioned. (*Baynham v. Guy's Hospital*, 3 Ves. 295; *Nicholson v. Smith*, 22 Ch. D. 640; 52 L. J., Ch. 191; *Rubery v. Jervoise*, 1 T. R. 229; *Bogg v. Midland Rail. Co.*, L. R., 4 Eq. 310; 36 L. J., Ch. 440.) And where the right is subject to a condition precedent, the condition must be performed, otherwise the tenant cannot claim a renewal. If the condition is the performance of the covenants in the former lease, they must have been performed, or the right to take advantage of non-performance waived. (*Job v. Banister*, 26 L. J., Ch. 125; 2 K. & J. 374; *Thompson v. Guyon*, 5 Sim. 65; *Finch v. Underwood*, 2 Ch. D. 310; 45 L. J., Ch. 522; *Bastin v. Bidwell*, 18 Ch. D. 238; 44 L. T. 742.)

A right of renewal given to two lessees cannot be exercised by one only during the joint lives of the two. (*Finch v. Underwood, supra.*)

Kay, L. J., has held that, in a lease under a power to lease and enter into contracts for leases, a covenant to renew at the expiration of the term is valid; but when the time for carrying the covenant into effect arrives, it must be shown that the rent and covenants stipulated for are the best rent and proper covenants at the time. (*Gas Light and Coke Co. v. Touse*, 35 Ch. D. 519; 56 L. J., Ch. 889; and see *Dowell v. Dew*, 1 Y. & C. Ch. 345; 12 L. J., Ch. 158.) In the case of *Salamon v. Sopwith* (35 L. T. 826) the Court of Appeal held that a power to grant leases in possession, at a rack rent, did not authorize a covenant for renewal. The Settled Estates Act, and the Settled Land Acts, which require leases thereunder to take effect in possession, do not authorize a covenant for renewal. (*Re Farnell's Settled Estates*, 33 Ch. D. 599; 35 W. R. 250.)

A surrender of a lease for the purpose of renewal may be made notwithstanding sub-leases may have been granted, and without the necessity for the surrender of such sub-leases, but the surrender leaves untouched the sub-contract (by lease or agreement); and the effect of a new demise is to put the new lessee in the position of an assignee of the reversion of the sub-lease. (4 Geo. 2, c. 28, s. 6; *Cousins v. Phillips*, 35 L. J., Ex. 84; 3 H. & C. 892.)

Leases by estoppel, which depend for their validity not upon the estate of the lessor, but upon a certain rule of expediency and good faith, are dealt with later. (*Infra*, p. 23.) The doctrine of estoppel is also a very important safeguard to the landlord, by virtue of the rule next considered. *Leases by estoppel.*

Upon the principle that a person who gets possession from another is, by taking possession from him, estopped from denying his right to give possession, a tenant is not permitted, either in an action of ejectment, or trespass, or for rent, to dispute the title of his landlord by whom he was let into possession (*Delaney v. Fox*, 26 L. J., C. P. 248; 2 C. B., N. S. 768; *Cook v. Whellock*, 24 Q. B. D. 658; 59 L. J., Q. B. 329), so long as the possession continues either in the original tenant or his under-tenant (*London and North Western Rail. Co. v. West*, 36 L. J., Tenant cannot dispute his landlord's title.

C. P. 245; L. R., 2 C. P. 553), or in a person voluntarily let into possession by the tenant (*Doe v. Mills*, 2 A. & E. 17), or otherwise claiming under him. (*Doe v. Austin*, 9 Bing. 41.) A tenant may, however, show that his landlord's title has expired. (*Hopcraft v. Keys*, 9 Bing. 613.) By the same rule, where a person claiming to be the assignee of the title of the landlord, without fraud or misrepresentation, receives rent from the tenant, the tenant cannot afterwards deny that title, except by showing that he paid the rent in ignorance of the true state of the title, and that some other person is the real assignee of the reversion. (*Carlton v. Bowcock*, 51 L. T. 659; *Doe v. Wiggins*, 4 Q. B. 367.)

Purchase
subject to
void lease.

It has been held, that a purchaser who buys expressly subject to a void or voidable lease, or other partial interest, cannot dispute the right of the party in whose favour the reservation is made. (*Walton v. Stamford*, 2 Vern. 279; Sug. 752.) But this would only seem to apply when the vendor is the grantor of the lease, or would be liable to an action at the suit of the lessee if ejected. Therefore, where a lease was granted by a former tenant for life who had no power to lease, and the sale was made after the death of the tenant for life by the owner in fee, and conveyed subject to the lease, it was held that the purchaser was not bound to give effect to the lease. (*Smith v. Widlake*, 3 C. P. D. 10; 47 L. J., C. P. 282; 26 W. R. 52; and see *Doe v. White*, 2 D. & R. 716.)

CHAPTER II.

CAPACITY OF THE CONTRACTING PARTIES.

SECT. 1.—*Who may be Lessors.*

EVERY person not under any legal disability may grant a lease of his lands, houses and other tenements for any period not exceeding in duration his own estate in the property leased; but, except in certain cases hereafter noticed, a lease for a longer term will determine upon the cessation of the original interest, in accordance with the general rule that no man can carve out of his own estate an interest which is to extend beyond it. If, therefore, a tenant for life, independently of any statutory or other power so to do, execute a lease for ninety-nine years or create a tenancy from year to year, such lease or tenancy, though valid during his life, will expire at his death (*Bragg v. Wiseman*, Brownlow & G. 22; *Doe v. Roberts*, 16 M. & W. 778); or, if land, at the expiration of the then current year of the tenancy. (14 & 15 Vict. c. 25, s. 1.) Generally.

There are, however, cases where tenants in tail or for life, or trustees, are expressly empowered by statute, settlements, or wills to grant leases exceeding in duration the extent of their own interests; where persons ordinarily unable to contract are enabled to grant leases for limited terms, subject to certain conditions and restrictions, and even where persons, possessing no estate at all, are nevertheless able to make leases by deed, which, although inoperative as against the real owner, will, in accordance with the rule that no man is permitted to allege or prove anything in contradiction of his own deed (*Lyon v. Reed*, 13 M. & W. 285), create a tenancy by estoppel as between the lessor and lessee; that is to say, the lessor will not, unless he be a trustee for the public, deriving his authority from an Act of Parliament (*Fairtitle v. Gilbert*, 2 T. R. 169; but see *Doe v. Horne*, 3 Q. B. 757), be allowed during the Leases by estoppel.

continuance of the lease to aver that he had no interest in the property (*Darlington v. Pritchard*, 4 M. & G. 783; *Green v. James*, 6 M. & W. 656); nor can the lessee, if he have executed, or entered into possession under, the lease, so long as he retains possession, dispute the lessor's title (*Phipps v. Sculthorpe*, 1 B. & Ald. 50; *Cuthbertson v. Irving*, 28 L. J., Ex. 306; 29 L. J., Ex. 485; *Lery v. Lewis*, 28 L. J., C. P. 304; 30 L. J., C. P. 141), even where the lease is not under seal (*Agar v. Young*, Car. & M. 78; *Doe v. Foster*, 3 C. B. 229), except to show that such title has been determined by effluxion of time or by act of law. (*England v. Slade*, 4 T. R. 682; *Doe v. Ramsbotham*, 3 M. & S. 516; *Mountney v. Collier*, 22 L. J., Q. B. 124; *Langford v. Selmes*, 3 K. & J. 226.) Recent decisions seem to establish that even where it appears on the face of the deed that the lessor has no estate in the premises, an estoppel arises. (*Morton v. Woods*, L. R., 3 Q. B. 658; L. R., 4 Q. B. 293; 37 L. J., Q. B. 242, 249; 38 L. J., Q. B. 81, 85; *Ex parte Punnett, Re Kitchin*, 16 Ch. D. 227; 50 L. J., Ch. 212.) But a tenant who has attorned to a person from whom he did not receive possession is not estopped from showing want of title in such person. (*Cornish v. Searell*, 8 B. & C. 475; and see *Carlton v. Boucock*, 51 L. T. 659, ante, p. 22.) Should the lessor of lands in which he has no estate afterwards acquire an estate, the lease, which before operated by estoppel only, becomes a lease in interest (Bac. Ab. (O.) 189; Co. Litt. 47 b; *Smith v. Low*, 1 Atk. 489; *Webb v. Austin*, 7 M. & G. 701; *Sturgeon v. Wingfield*, 15 L. J., Ex. 212; *Doe v. Ongley*, 20 L. J., C. P. 26), so as to bind the heirs or assigns of the lessor; for an estoppel is not confined to the parties to the lease, but is annexed to the estate, and binding alike on all persons claiming under them. (*Trevivan v. Lawrence*, 2 Salk. 276; *Goodtitle v. Morse*, 3 T. R. 371; *Doe v. Thompson*, 9 Q. B. 1043; *Barwick v. Thompson*, 7 T. R. 488; *London & N. W. Rail. Co. v. West*, 36 L. J., C. P. 245; L. R., 2 C. P. 553.) An estoppel must be reciprocal and binding on both parties (Co. Litt. 352 a); hence, leases by infants are exempt from the operation of the doctrine for want of mutuality (*James v. Landon*, Cro. Eliz. 37); nor is the crown bound by estoppel. Moreover, if any estate or interest passes from the lessor, there can be no estoppel. (*Cuthbertson v. Irving*, 28 L. J., Ex. 306; 29 L. J., Ex. 485.)

But possession and payment of rent reserved by a lease,

by a person who, by virtue of the Statute of Limitations, has acquired an interest which extinguishes the tenant's estate does not operate as an assignment of the lease by estoppel so as to create the relationship of landlord and tenant upon the terms of the lease. (*Tichborne v. Weir*, 67 L. T. 735.)

A tenant in fee simple absolute possesses the most extensive estate in land recognized by the law of England. He may grant a lease for any number of lives or term of years without limitation or restraint. (Com. Dig. "Estates" (G. 2); Bac. Ab. "Leases," c. 1, s. 1.) A lease of lands, of part of which the lessor was tenant in fee and of part tenant for life, was held good after his death for those lands only of which he was seized in fee. (*Doe v. Meyler*, 2 M. & S. 276.)

Tenants in fee,

Under the Settled Land Act, 1882, the powers of leasing conferred by that statute upon tenants for life may be exercised by a tenant in fee simple in possession with an executory limitation, gift, or disposition over (*Re James*, 32 W. R. 898; 51 L. T. 596), or by a person entitled in possession to a base fee. (45 & 46 Vict. c. 38, s. 58, sub-ss. 2, 3, *infra*, p. 33.)

with executory limitation over.

Base fee.

A tenant in tail could not formerly make any lease to endure longer than his own life; for, at his decease, any outstanding lease made by him was absolutely void as against remaindermen and reversioners, and voidable at the election of the issue in tail.

Tenants in tail.

By the Fines and Recoveries Act (3 & 4 Will. 4, c. 74) tenants in tail were empowered to dispose of the lands entailed for an estate in fee simple absolute or for *any less estate* (which words include a lease for any number of years or for a life or lives) by a deed enrolled, and even without enrolment they may make leases by deed equally binding as against the issue in tail, remaindermen or reversioners, for any period not exceeding twenty-one years from the date, or from any time not exceeding twelve calendar months from the date thereof, reserving a rack rent, or not less than five sixths parts of a rack rent. (Sects. 15, 40, 41.) If the tenant in tail making the lease be a *feme covert*, the concurrence of her husband is necessary, and the deed must be acknowledged by her in manner directed by the Act. (Sect. 40.) Under the Settled Estates Act, 1877, tenants in tail may also, without any application to the Court, make leases for any term not exceeding twenty-one years in the same manner as tenants for life.

(40 & 41 Vict. c. 18, s. 46.) Under the Settled Land Act, 1882, the powers of leasing conferred by that statute upon tenants for life may be exercised by a tenant in tail in possession. (45 & 46 Vict. c. 38, s. 58, sub-s. 1; *infra*, p. 33.)

Tenant in tail
after possi-
bility of issue
extinct.

A tenant in tail in possession after possibility of issue extinct may exercise the leasing powers conferred on tenants for life both by the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 2, and by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 58, sub-s. 7.

A lease made by a tenant in tail *not* in pursuance of the above-mentioned statutes, or of a power to lease, though not absolutely determined by his death, is voidable, and may then be affirmed or avoided at the pleasure of the issue in tail. (Bac. Ab. "Leases," D. 18.) Bringing an action of waste, or for rent, or acceptance of rent by the issue in tail, have been considered acts of confirmation. (*Doe v. Jenkins*, 5 Bing. 469; Bac. Ab. "Leases," D. 19.)

Tenants for
life.

Unless specially empowered by statute or by the deed or will under which he holds, a tenant for life cannot make any disposition of the lands to take effect after his decease, and any lease for years that he may make will be absolutely void at his death (Bac. Ab. "Leases" (I.); *Adams v. Gibney*, 6 Bing. 656), or, in the case of "a farm or lands," at the end of the then current year of the tenancy (14 & 15 Vict. c. 25, s. 1), and, except under sect. 12 of the Settled Land Act, 1882, cannot be confirmed by the reversioner (*Doe v. Butcher*, 1 Doug. 50); although such acts as acceptance of rent will be evidence of a new tenancy from year to year upon such of the terms of the void lease as are applicable to that tenancy (*Doe v. Morse*, 1 B. & Ad. 365; see *Cornish v. Stubbs*, L. R., 5 C. P. 334; 39 L. J., C. P. 202, 205), so as to entitle the tenant to notice to quit. (*Doe v. Watts*, 7 T. R. 83.) And where the succeeding owner knowingly permits the tenant to expend money in improvements, the Court will not allow him subsequently to controvert the lease. (*Jackson v. Cator*, 5 Ves. 688; *Dann v. Spurrier*, 7 Ves. 231.)

Leases under
express
powers.

To obviate the difficulty of leasing land in the possession of tenants for life and other limited owners, it was formerly the practice to insert in all well-drawn settlements a power enabling the limited owner in possession who was *sui juris*, and in other cases the trustee of the settlement, to grant leases of the settled property. Such

powers, though still common, are of less importance since the passing of the Settled Land Act, 1882.

Whatever conditions and restrictions are attached to the power must be strictly observed, otherwise the lease, although valid as between lessor and lessee by way of estoppel (*Yellowly v. Gower*, 24 L. J., Ex. 289), will be void against the remainderman or reversioner, unless the defective execution of the power be cured by the provisions of two acts, which have provided that, except in cases of leases made by ecclesiastical corporations (12 & 13 Vict. c. 26, s. 7), leases made *bonâ fide* under powers, and under which the lessees have entered, but which are invalid by reason of some deviation from the terms of the power, are to be deemed in equity contracts for such leases as might have been properly granted (12 & 13 Vict. c. 26, s. 2); and that if the person against whom such leases are invalid accept rent, and before or upon its acceptance sign any receipt, memorandum, or note in writing confirming the lease, they are to be deemed to be confirmed as against them. (13 & 14 Vict. c. 17, s. 2.)

Relief on defective execution of powers.
12 & 13 Vict. c. 26.

13 & 14 Vict. c. 17.

These statutes were intended to cure defects which were merely formal, and not to give effect to unauthorized lettings. They do not render valid leases granted by a person who had no power to lease (*Ex parte Cooper*, 24 L. J., Ch. 378); or a lease of one kind by treating it as a contract for a lease of another kind (*Re Hallett to Martin*, 24 Ch. D. 624; 52 L. J., Ch. 804); or give power to alter a lease which is in conformity with the contract of the parties. (*Gas Light and Coke Co. v. Towse*, 35 Ch. D. 519; 56 L. J., Ch. 889.) Thus a building lease for thirty-five years, and invalid as such on account of the omission of a covenant to build, cannot be cured by treating it as an ordinary lease for an authorized term of twenty-one years. (*Re Hallett to Martin*, 24 Ch. D. 624; 52 L. J., Ch. 804.) And where under a power to lease for seventy-five years a lease was granted for thirty years, with a covenant (held to be invalid) for renewal for another thirty years, the Court refused to alter the lease into one for sixty years. (*Gas Light and Coke Co. v. Towse*, *supra*.)

Where a tenant for life had agreed to grant a lease under a power, but died before executing the lease, the power was held to be equitably exercised, and a lease directed to be granted. (*Davis v. Harford*, 22 Ch. D. 128; 52 L. J., Ch. 61.)

Construction
of powers.

A power to lease, when expressed in language of unambiguous meaning, is construed according to the literal import of the words used. Thus a power to grant such leases as the grantor may "think fit" (*Sheehy v. Muskerry*, 1 H. L. Ca. 576), or as to him may "seem reasonable and proper" (*Mostyn v. Lancaster*, 23 Ch. D. 583; 52 L. J., Ch. 848), confers an arbitrary authority without any limitation.

If the terms of the power are ambiguous, it is to be interpreted by reference to the context, to the general intent of the instrument, and, if necessary, to surrounding circumstances. (*Per Kelly*, C. B., L. R., 2 C. P. 427; *Ren v. Bulkeley*, 1 Doug. 292; *Taylor v. Horde*, 1 Burr. 60, 120; 2 Sm. L. C. 632, 9th ed.; *Pomery v. Partington*, 3 T. R. 665; *Griffith v. Harrison*, 4 T. R. 737.) Thus a power to lease mines and minerals following a gift of a life estate in the property of which they formed a part, was held, upon the collected intention of the will, to restrict the power to a lease not exceeding the life of the tenant for life. (*Jegon v. Vivian*, L. R., 2 C. P. 422; L. R., 3 H. L. Cas. 285.) As a general principle, a person acting under a power may do less than the power authorizes (*Isherwood v. Oldknow*, 3 M. & S. 382; *Edwards v. Milbank*, 29 L. J., Ch. 45; Sug. Pow. 746); and a lease for a longer term than is authorized is good to the extent of the power. (2 Ves. 644.)

Best rent.

A power usually provides for the reservation of the best rent. The "best rent" is a question of fact (*Wright v. Smith*, 5 Esp. 203), of which one of the tests is, whether the man who makes the lease has got as much for others as he has for himself. (*Montgomery v. Wemyss*, 5 Dow, 293.) The best rent means the best rack rent that can reasonably be required by the lessor from a desirable tenant. He is not bound to accept the person who offers the highest rent. (*Doe v. Radcliffe*, 10 East, 278.) Unless otherwise authorized by the power, a uniform rent must be reserved throughout the term. (*Doe v. Harvey*, 1 B. & C. 426.)

Building and
repairing
leases.

A power to grant "building or repairing leases" was held well executed by the granting of a lease containing covenants to do "needful and necessary repairs" (*Easton v. Pratt*, 33 L. J., Ex. 233; 2 H. & C. 676); and a power to lease premises to a person who should "covenant or agree to improve or repair," was satisfied by an agreement

in the lease for the tenant "to do necessary repairs." (*Truscott v. Diamond Rock Boring Co.*, 20 Ch. D. 251; 51 L. J., Ch. 259.) But a lease with merely repairing covenants has been held not to be a compliance with a power to grant "building leases" (*Jones v. Verney*, Willes, 169; *Re Hallett to Martin*, 24 Ch. D. 624), or "leases for the purpose of rebuilding and repairing." (*Doe v. Withers*, 2 B. & Ad. 896; and see *Truscott v. Diamond Rock Boring Co.*, *supra*.)

A power to lease to "a person or persons," includes a corporation. (*Re Jeffcock's Trust*, 51 L. J., Ch. 507.)

Powers in settlements conferred upon trustees have been rendered almost nugatory by the Settled Land Acts, which, besides giving extensive powers to a tenant for life, have rendered his consent necessary to any exercise, by the trustees, of the power of leasing conferred on them by the settlement. (45 & 46 Vict. c. 38, s. 56, sub-s. 2; *Re Duke of Newcastle's Estates*, 24 Ch. D. 129; 52 L. J., Ch. 645.)

Trustees can only lease with consent of tenant for life.

The Settled Estates Act, 1877 (40 & 41 Vict. c. 18), which repealed and consolidated five previous statutes, commencing with the original Act of 1856, enacted that, in the case of settlements made after 1st November, 1856 (sect. 57), it shall be lawful for any person entitled to the possession or to the receipt of the rents and profits of any settled estates for an estate for life, or for a term of years determinable with any life or lives, or for any greater estate, either in his own right or in right of his wife, unless the settlement shall contain an express declaration that it shall not be lawful for such person to make such demise; and also for any person entitled to the possession or to the receipt of the rents and profits of any unsettled estates as tenant by the curtesy, or in dower, or in right of a wife who is seised in fee, to demise by deed the premises or any part thereof (except the principal mansion-house and demesnes thereof, and other lands usually occupied therewith) without application to the Court, for any term not exceeding twenty-one years, so far as relates to estates in England, and thirty-five years so far as relates to estates in Ireland, to take effect in possession, or within one year from the making thereof, at the best rent reasonably obtainable, without any fine: provided that the lease be not without impeachment of waste (*Davies v. Davies*, 38 Ch. D. 499), and contain a covenant to pay the rent and such other usual and proper covenants as the lessor

Leases under the Settled Estates Act, 1877.

may think fit, and a condition of re-entry on non-payment of rent for twenty-eight days or for some less period, and provided a counterpart be executed by the lessee. (Sect. 46.) The execution of the lease by the lessor shall be deemed sufficient evidence of the execution of the counterpart. (Sect. 48.) Leases of copyholds purposed to be made pursuant to this Act must have the licence or consent of the lord. (Sect. 56.)

A person is to be deemed "entitled to the possession or to the receipt of rents and profits," notwithstanding any charge or incumbrance on the estate (sect. 54); but it seems doubtful whether when the management of the estate is in trustees who receive the rents, and, after discharging outgoings, pay the balance to the tenant for life, the latter is entitled to exercise the powers of leasing conferred on a tenant for life. (*Taylor v. Taylor*, L. R., 20 Eq. 297; 3 Ch. D. 147; 45 L. J., Ch. 373, 848.) The Act also empowers the Court to authorize leases of settled estates, included in a settlement of whatever date (sect. 57), for any purpose whatsoever, whether involving waste or not, so that the lease take effect in possession at or within one year from the making thereof and be for a term of years not exceeding, for an agricultural or occupation lease, twenty-one years so far as relates to estates in England, and thirty-five years so far as relates to estates in Ireland; for a mining lease or lease of water, watermills, wayleaves, waterleaves, or other rights or easements, forty years; for a repairing lease sixty years; and for a building lease ninety-nine years; or, if satisfied that it is the usual custom of the district and beneficial to the inheritance, any of the above (except agricultural leases) may be granted for such terms as the Court shall direct. The lease must reserve the best rent, uniform or not, without fine; but in the case of a mining, building, or repairing lease the Court may direct a peppercorn rent, or one less than that ultimately payable, to be made payable during any part of the first five years. In the case of a lease of minerals, a portion of the rent reserved shall be set aside and invested, viz., when the person for the time being entitled to the receipt of the rent is a person entitled to work such minerals for his own benefit, one fourth part of such rent, and otherwise, three-fourth parts (sect. 4). Sections 5 to 15 of the Act contain other provisions as to leases to be authorized by the Court.

This salutary Act has been rendered almost obsolete by the Settled Land Acts, for, although it is not repealed, a tenant for life can under the Settled Land Acts exercise, without application to the Court, almost all the powers conferred upon the Court by the earlier Act. There are a few cases in which it may be still desirable to resort to the leasing powers of the Settled Estates Act, viz., 1st, in mining leases where it is desired to reserve a peppercorn rent, or where a tenant for life, impeachable for waste, wishes to lease *open* mines, as under the Settled Estates Act, sect. 4, only one-fourth of the rent need be set aside instead of three-fourths as required by the Settled Land Act, 1882, s. 11; and 2ndly, in the case of leases by a tenant in dower, under sect. 46 of the earlier Act. Moreover, where powers of leasing have been obtained by an order of the Court under the Settled Estates Act, 1877, the powers of the Settled Land Acts cannot be exercised without first obtaining a suspension of the order under the earlier Act. (*Re Poole's Settled Estates*, 32 W. R. 956; 50 L. T. 585; *Re Barrs-Haden's Settled Estates*, 32 W. R. 194.)

How far
superseded by
Settled Land
Acts.

The Settled Land Act, 1882 (45 & 46 Vict. c. 38), as amended by the four Acts of 1884 (47 & 48 Vict. c. 18), of 1887 (50 & 51 Vict. c. 30), of 1889 (52 & 53 Vict. c. 36), and of 1890 (53 & 54 Vict. c. 69), is the most important enactment in the statute book as regards this branch of our subject, and has rendered of comparative unimportance the learning as to the leasing powers outside that statute of limited owners granting leases after the date when it came into force. It came into force on the 1st of January, 1883, and the leasing powers thereby conferred upon tenants for life and other limited owners apply to all settlements whenever made (45 & 46 Vict. c. 38, s. 2, sub-s. 1; 53 & 54 Vict. c. 69, s. 4), and notwithstanding the settled land, or the interest of the tenant for life therein, is incumbered or charged. (45 & 46 Vict. c. 38, s. 2, sub-s. 7.)

Leases under
the Settled
Land Acts.

Powers of
Acts attach to
all settle-
ments.

The powers are inherent in the tenant for life, and, with the one exception hereinafter mentioned, are inalienable. Any attempt made by the settlor either by condition, forfeiture, or otherwise, to restrain such limited owner from exercising the powers conferred by the Act is void. (45 & 46 Vict. c. 38, s. 51; *Re Paget's Will*, 55 L. J., Ch. 42; 30 Ch. D.

Powers in-
herent and
inalienable.

161; *Re Hazle's Settled Estates*, 29 Ch. D. 78; 54 L. J., Ch. 628), and the exercise of the powers of the Act shall not occasion a forfeiture. (Sect. 52.) The powers cannot be assigned by operation of law or otherwise, or released, and any contract not to exercise them is void. (Sect. 50.) An assignment or charge by the tenant for life made in consideration of marriage or by way of family arrangement, and not being a security for payment of money advanced, is excepted. (53 & 54 Vict. c. 69, s. 4.) Even after a mortgage or assignment for value of his estate, the tenant for life may, without the consent of the assignee, unless actually in possession, grant leases, provided they are made at the best rent that can reasonably be obtained without fine and in other respects are in conformity with the Act. (44 & 46 Vict. c. 38, s. 50, sub-ss. 3, 4.)

Tenant for
life defined.

Throughout the Act the person to exercise the powers of the Act is the legal or equitable tenant for life in possession, that is, the person beneficially entitled in possession to the receipt of the income of the land for his life, or who would be so entitled under the settlement to the surplus of such income, if there were any, notwithstanding there may be prior incumbrances which absorb the whole of the income. (45 & 46 Vict. c. 38, s. 2, sub-ss. 2, 10 (i); *Re Jones*, 26 Ch. D. 736; 53 L. J., Ch. 807; *Re Clitheroe Estate*, 31 Ch. D. 135; 55 L. J., Ch. 107; *Re Hale and Clark*, 55 L. J., Ch. 550.)

But his interest must be one in possession; and where a life estate is preceded by an absolute trust to accumulate for twenty years, there is, during that period, no tenant for life within the Act. (*Re Strangways*, 34 Ch. D. 423; 56 L. J., Ch. 195.) Moreover, he must be "entitled," as distinguished from the receipt of rent applied under a discretionary trust for payment to him. (*Re Atkinson*, 31 Ch. D. 577; 54 L. T. 403.) Several persons so entitled as tenants in common, or joint tenants, or for other concurrent estates or interests, together constitute the tenant for life. (45 & 46 Vict. c. 38, s. 2, sub-s. 6.) Where the trusts of land were to apply the net rents as the trustees should think fit during the life of A., to A., his wife, and children, or any one or more of such objects, it was held, that they were mere objects of a discretionary trust, and that no person was entitled as tenant for life within the act. (*Re Atkinson*, *supra*.)

If one of several tenants for life refuses to concur in the exercise of the powers of the Act, there is no means of compelling him to concur.

As to other limited owners, it is enacted as follows by 45 & 46 Vict. c. 38, s. 58:—

(1.) Each person as follows shall, when the estate or interest of each of them is in possession, have the powers of a tenant for life under this Act, as if each of them were a tenant for life as defined in this Act (namely):

Other limited owners having powers of tenant for life.
Settled Land Act, 1882, s. 58.

(i) A tenant in tail, including a tenant in tail who is by Act of Parliament restrained from barring or defeating his estate tail, and although the reversion is in the Crown, and so that the exercise by him of his powers under this Act shall bind the Crown, but not including such a tenant in tail where the land in respect whereof he is so restrained was purchased with money provided by Parliament in consideration of public services:

(ii) A tenant in fee simple, with an executory limitation, gift, or disposition over, on failure of his issue, or in any other event: [*Re Morgan*, 24 Ch. D. 114; 53 L. J., Ch. 85; *Re James*, 32 W. R. 898; 51 L. T. 596.]

(iii) A person entitled to a base fee, although the reversion is in the Crown, and so that the exercise by him of his powers under this Act shall bind the Crown:

(iv) A tenant for years determinable on life, not holding merely under a lease at a rent: [Does not include a person entitled for life to the rent reserved under a lease for a term of years (*Re Hazle's Settled Estates*, 29 Ch. D. 78; 54 L. J., Ch. 628.)]

(v) A tenant for the life of another, not holding merely under a lease at a rent:

(vi) A tenant for his own, or any other life, or for years, determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate or by conditional limitation [*e.g.*, a conditional limitation over on non-residence (*Re Paget's Settled Estates*, 30 Ch. D. 161; 55 L. J., Ch. 42)], or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumulation

of income for payment of debts or other purpose :
 [Distinguish between a gift in remainder after a term and absolute trust for accumulation of income (*Re Strangways*, 34 Ch. D. 423 ; 56 L. J., Ch. 195), and an immediate gift, subject to a term and trust for accumulation to pay charges which exhaust the whole income, but which the tenant for life may redeem (*Re Clitheroe Estate*, 31 Ch. D. 135 ; 55 L. J., Ch. 107.)]

(vii) A tenant in tail after possibility of issue extinct :

(viii) A tenant by the curtesy : [And see 47 & 48 Vict. c. 18, s. 8 ; *Mogridge v. Clapp*, 40 W. R. 663 ; 61 L. J., Ch. 534 ; [1892] 3 Ch. 382.]

(ix) A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy, or other event : [This includes the person who would be entitled to the income, if there were any, although the whole is in fact exhausted by charges. (*Re Jones*, 26 Ch. D. 736 ; 53 L. J., Ch. 807 ; *Re Clitheroe Estate*, *supra*.)]

(2.) In every such case the provisions of this Act referring to a tenant for life, either as conferring powers on him or otherwise, and to a settlement, and to settled land, shall extend to each of the persons aforesaid, and to the instrument under which his estate or interest arises, and to the land therein comprised.

(3.) In any such case any reference in this Act to death as regards a tenant for life shall, where necessary, be deemed to refer to the determination by death or otherwise of such estate or interest as last aforesaid.

Tenant for life of proceeds of sale of land.

Where land is held by trustees on trust for sale, the tenant for life, or other limited owner of the proceeds of sale, may exercise the powers of the Act with the leave of the Court. (45 & 46 Vict. c. 38, s. 63 ; 47 & 48 Vict. c. 18, s. 7 ; *Re Harding's Estate*, [1891] 1 Ch. 60.)

Powers of tenant for life as to agreements for leases.

A tenant for life may contract to make any lease ; and in making the lease may vary the terms, with or without consideration, but so that the lease be in conformity with the Act. (45 & 46 Vict. c. 38, s. 31, sub-s. 1 (iii).) Such contract shall be binding upon and enforceable against and

by every successor in title for the time being of the tenant for life. (Sect. 31, sub-sect. 2 ; and see *Davis v. Harford*, 22 Ch. D. 128.)

A tenant for life may accept a surrender of any lease of settled land, either in respect of the whole land leased or any part thereof (45 & 46 Vict. c. 38, s. 13 ; see *Easton v. Penny*, 67 L. T. 290) ; and in like manner may accept a surrender of a contract for a lease. (Sect. 31, sub-sect. 1 (iv).)

As to surrenders.

Under the Act of 1882 (45 & 46 Vict. c. 38), s. 6, "A tenant for life may lease the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same, for any purpose whatever, whether involving waste or not, for any term not exceeding—

As to leases.

" (i) In case of a building lease, ninety-nine years ;

" (ii) In case of a mining lease, sixty years ;

" (iii) In case of any other lease, twenty-one years."

Before making such a lease the tenant for life must give one month's notice in writing to each of the trustees of the settlement, and also to the trustees' solicitor if known to him (45 & 46 Vict. c. 38, s. 45), though the trustees may waive such notice. (47 & 48 Vict. c. 18, s. 5, sub-s. 3.) It is sufficient if the notice be given before the execution of the lease : it is not a condition precedent to a valid contract. (*Duke of Marlborough v. Sartoris*, 32 Ch. D. 616 ; 56 L. J., Ch. 70 ; *Hatten v. Russell*, 38 Ch. D. 334 ; 57 L. J., Ch. 425.) A person dealing in good faith with the tenant for life is not concerned to inquire whether the notices were given. (45 & 46 Vict. c. 38, s. 45 (3).) It would appear that a lease would be valid even if there were no trustees, certainly if the lessee was ignorant of the fact, and acting in good faith. (*Mogridge v. Clapp*, 40 W. R. 663 ; 61 L. J., Ch. 534 ; [1892] 3 Ch. 382 ; but see *Hughes v. Fanagan*, 30 L. R. Ir. 111.)

After notice to trustees.

A lease of the principal mansion house and the pleasure grounds, and park and lands (if any) usually occupied therewith, cannot be leased without the consent of the trustees of the settlement or an order of Court. (53 & 54 Vict. c. 69, s. 10.)

Mansion house only with consent of trustees.

Where it is shown to the Court that it is according to the custom of the district, or that it is difficult to make leases except for longer terms, the Court may, in the case of a building or mining lease, authorize the tenant for life to make leases for any term or in perpetuity, at fee farm

Longer terms with sanction of Court.

or other rents, secured by condition of re-entry or otherwise. (45 & 46 Vict. c. 38, s. 10.) Thus, upon proof of custom, a building lease for 999 years might be sanctioned. (*Re Carr*, 9 W. R. 766; *Re Cross's Charity*, 27 Beav. 592.) The reservation of a perpetual rent operates to create a rent-charge in fee simple, having incident thereto all the powers contained in sect. 44 of the Conveyancing Act, 1881. (53 & 54 Vict. c. 69, s. 9.)

Terms grant-
able without
notice to
trustees.

Not to exempt
lessee from
liability for
waste.

By the Act of 1890 (53 & 54 Vict. c. 69), s. 7, "A lease for a term not exceeding twenty-one years at the best rent that can be reasonably obtained without fine, and *whereby the lessee is not exempted from punishment for waste*, may be made by a tenant for life (1) without any notice of an intention to make the same having been given under sect. 45 of the Act of 1882; and (2) notwithstanding that there are no trustees of the settlement for the purposes of the Settled Land Acts, 1882 to 1890." It would appear that a lease under this section would be invalid as exempting the lessee from liability for waste if it contain a covenant by the lessor to repair (*Yellowly v. Gower*, 24 L. J., Ex. 289; 11 Ex. 274), or a covenant by the lessee to repair, "fair wear and tear and damage by tempest excepted." (*Davies v. Davies*, 38 Ch. D. 499; 57 L. J., Ch. 1093.) So in the case of an agricultural lease which authorizes the tenant to plough up pasture land (see *Doe v. Ferrand*, 20 L. J., C. P. 202), or a lease of land with a power to open unopened mines. (*Clegg v. Rowland*, L. R., 2 Eq. 166; 35 L. J., Ch. 396.) In fact the lease must contain no provision under which the tenant may either commit or permit waste. (See 3 Dav. Conv. 504.) A lease which contravenes the Act would, however, be good by way of estoppel as between the parties. (*Yellowly v. Gower*, *supra*.)

Regulations
as to leases
for three
years.

A tenant for life may demise by any writing under hand only containing an agreement instead of a covenant by the lessee for payment of rent in cases where the term does not extend beyond three years from the date of the writing, but the lessee must not be exempted from punishment for waste. (53 & 54 Vict. c. 69, s. 7.)

As to leases
for more than
three years.

Leases for more than three years must comply with the Act of 1882 (45 & 46 Vict. c. 38), s. 7, which requires that (1) every lease shall be by deed, and be made to take effect in possession not later than twelve months after its date [and shall not contain a covenant for renewal (*Re Farnell's Settled Estates*, 33 Ch. D. 599; *Salamon v. Sopwith*, 35 L. T.

826)] ; (2) shall reserve the best rent that can reasonably be obtained, regard being had to any fine taken and to any money laid out or to be laid out for the benefit of the settled land [in pursuance of a previous agreement, and not being a past voluntary expenditure (*Re Chauncer's Settled Estates*, 40 W. R. 538 ; [1892] 2 Ch. 192 ; 61 L. J., Ch. 331)], and generally to the circumstances of the case ; and (3) contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified, not exceeding thirty days ; and (4) a counterpart must be executed by the lessee and delivered to the tenant for life, of which execution and delivery the execution of the lease by the tenant for life shall be sufficient evidence.

A lessee dealing in good faith shall be taken to have given the best rent (sect. 54) ; and exceptions from obtaining the best rent occur in the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70, s. 74), and the Agricultural Holdings Act, 1883, s. 43.

A building lease within the Act is one for any "building purposes," which expression includes the erecting, and the improving of, and the adding to, and the repairing of buildings. (45 & 46 Vict. c. 38, s. 2, sub-s. 10 (iii).) Every building lease shall be made partly in consideration of the lessee or some person by whose direction the lease is granted, or some other person, having erected, or agreeing to erect, buildings, new or additional, or having improved or repaired, or agreeing to improve or repair, buildings, or having executed, or agreeing to execute, on the land leased, an improvement authorized by the Act for or in connection with building purposes. (45 & 46 Vict. c. 38, s. 8.) A peppercorn rent, or rent less than that ultimately payable, may be reserved for not more than five years, and the rent reserved under a contract may be apportioned (in sums of not less than ten shillings) upon the leases granted under the contract (*ib.* sub-sect. 2).

As to building leases.

A building lease, or an agreement for a building lease, may contain an option (to be exercised within ten years) for the lessee to purchase the land leased at a fixed price (52 & 53 Vict. c. 36, s. 2), and any successor in title may execute a conveyance to give effect to the contract. (53 & 54 Vict. c. 69, s. 6.)

With option to purchase.

A mining lease is a lease for any mining purpose or purposes connected therewith, and includes a grant or

As to mining leases.

licence for any mining purposes, and may be granted of mines and minerals whether already opened or in work or not. (45 & 46 Vict. c. 38, s. 2, sub-sect. 10 (iv).) The rent may be made to vary according to the acreage worked, or the quantity or market price or value of the minerals or substances gotten, and a fixed or minimum rent may be made payable (s. 9; 53 & 54 Vict. c. 69, s. 8). Moreover, whether the mines or minerals leased are already opened or in work or not, if the tenant for life is impeachable for waste in respect of minerals, three-fourths, and otherwise one-fourth of the rent, must, unless a contrary intention is expressed in the settlement, be set aside as capital money (45 & 46 Vict. c. 38, s. 11); but not where the lease granted by a tenant for life was pursuant to a contract by his predecessor an absolute owner. (*Re Kemys-Tynte*, [1892] 2 Ch. 211.) The tenant for life of land held by trustees upon trust for sale is to be deemed impeachable for waste within this section. (*Re Ridge*, 31 Ch. D. 504; 55 L. J., Ch. 265.)

The Settled Land Acts do not, like the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 4, permit the reservation of a peppercorn rent in a mining lease. Moreover, in the case of an open mine, the leases authorized by the earlier Act are, as we have seen, more favourable for the tenant for life (*ante*, p. 31).

As to leases giving effect to existing equities.

The tenant for life may grant a lease for giving effect (1) to a contract entered into by any of his predecessors in title for making a lease, which, if made by the predecessor, would have been binding on the successors in title (*Re Kemys-Tynte*, 40 W. R. 423; [1892] 2 Ch. 211); (2) to a covenant for renewal, performance whereof could be enforced against the owner for the time being of the settled land (*ante*, p. 21); and (3) for confirming, as far as may be, a previous lease being void or voidable, but so that when confirmed it is such a lease as might have been lawfully granted at the date of the original lease. (45 & 46 Vict. c. 38, s. 12.)

The powers given by these Acts are cumulative, and do not abridge the powers given by the settlement or any other statute. (45 & 46 Vict. c. 38, ss. 56, 57; *Re Duke of Newcastle's Estates*, 24 Ch. D. 129; 52 L. J., Ch. 645; *Re Chaytor's Settled Estate Act*, 53 L. J., Ch. 312; 25 Ch. D. 631.)

Tenants *pur autre vie*.

A person who has an estate *pur autre vie*, i. e., for the life

of another, is at common law in the same position as an ordinary tenant for life, except that leases made by him will determine, not at his own, but on the death of the *cestui que vie*, or person for whose life the land is holden (*Blake v. Foster*, 8 T. R. 487; Co. Litt. 47b; 6 Co. 15a), or at the expiration of the then current year of the tenancy (14 & 15 Vict. c. 25, s. 1), so that he may make a lease to commence after his own death (*Uttly Dale's case*, Cro. Eliz. 182), and may exercise the leasing powers conferred on tenants for life by the Settled Estates Act, 1877 (see sect. 46), and by the Settled Land Act, 1882. (Sect. 58, sub-sect. 1 (v.).)

Tenants by the curtesy and in dower, whose estates are created by act of the law, are alike regarded in law as possessing estates for life only. They may grant leases under 40 & 41 Vict. c. 18, s. 46, in the same manner as tenants for life, and a tenant by the curtesy may exercise the powers of a tenant for life under the Settled Land Act, 1882. (Sect. 58, sub-sect. 1 (viii.); 47 & 48 Vict. c. 18, s. 8.) Tenants by the curtesy.

A tenant for years may, unless restrained by express agreement, make an underlease for any part of his term, and any assignment for less (though but a single day) than his own term is in effect an underlease (Sug. V. & P. 482; *Cottee v. Richardson*, 7 Ex. 143; Bac. Ab. "Leases;" *Rex v. Wilson*, 5 Man. & R. 157, n.; *Rex v. Aldborough*, 1 East, 597); but if it comprise the whole term, though it purport to be an underlease, it is in effect an assignment, by virtue of which his assignee will at once displace him and become tenant to the original lessor. (*Hicks v. Downing*, 1 Ld. Ray. 99; *Beardman v. Wilson*, L. R., 4 C. P. 57.) Tenants for years.

A tenant from year to year, whose estate is in fact a lease for a year certain with a growing interest during every succeeding year springing out of and parcel of the original contract (*Legg v. Strudwick*, 2 Salk. 414), may grant a lease for a term of years, which will subsist until defeated by the determination of his own estate (*Mackay v. Mackreth*, 4 Doug. 213; *Oxley v. James*, 13 M. & W. 209), or he may underlet from year to year; for such a letting is in legal operation a demise from year to year during the continuance of the original demise, and in either case he will have a reversion sufficient to enable him to distrain for rent. (*Pike v. Eyre*, 9 B. & C. 909; *Curtis v. Wheeler*,

Tenants from year to year.

Tenants for
less than
years.

Tenants at
will.

Tenants by
sufferance.

Leases by co-
owners.

Joint tenants.

Moo. & M. 493.) In his case, also, the general rule applies. He may assign or underlet the premises for any period less than his own term. In like manner, a tenant for a less period than for years, as, for one year certain or any agreed part of a year, is at liberty to create a sub-tenancy by sub-letting to another, unless restricted from doing so by the terms of his agreement. (Shep. Touch. 268; *Rex v. Aldborough*, 1 East, 597.) Indeed, all tenants, except tenants at will and at sufferance (*ante*, pp. 2, 3), may sub-let, and even these by demising may create a tenancy by estoppel as between themselves and their lessees in manner already noticed. (Cole, Ejec. 217; *per* Patteson, J., in *Doe v. Carter*, 9 Q. B. 865.)

Although joint tenants holding, as it is said in the technical Norman-French, *per mie et per tout*, together possess but one freehold and constitute but one owner, each of them has an exclusive right and dominion over his own share. They may therefore join or sever in leasing the whole estate or their respective shares to a stranger or to each other. (Co. Litt. 186 a; Com. Dig. "Leases" (I. 5); *Cowper v. Fletcher*, 34 L. J., Q. B. 187; 6 B. & S. 464; *Leigh v. Dickeson*, 12 Q. B. D. 194; 15 Q. B. D. 60; 53 L. J., Q. B. 120; 54 L. J., Q. B. 18.) Thus, three executors may agree that one shall hold land devised to them in trust, at a fixed rent; and if the rent fall into arrear he may be distrained upon (*Cowper v. Fletcher, supra*); and if after the expiration of the lease the tenant holds over, the same consequences follow as in the case of a lease between strangers, and he is liable in an action for use and occupation. (*Leigh v. Dickeson, supra*.) If one co-tenant in possession expend money in necessary repairs to the premises, he has no right of action against the other co-tenants for contribution. (*Ibid.*)

A lease executed by one of two joint tenants of the whole will simply pass his own moiety (Co. Litt. 186 a; *Bellingham v. Alsop*, Cro. Jac. 52), though it purport to be made by both (*Cartwright's case*, cited 1 Vent. 136); and a lease by two of three joint tenants in like manner will pass their two undivided thirds of the property. (*Philpott v. Dobbinson*, 3 Mo. & P. 320.) If a joint tenant die after making a lease for years of his share, it will bind the survivor, though made to commence after the lessor's death, and the lessee's interest will subsist until the term expires. (Litt. s. 289; *Grute v. Locroft*, Cro. Eliz. 287; *Clerk v.*

Clerk, 2 Vern. 323.) So, where joint tenants concur in granting a lease, they make but one lessor, for the lease is the joint demise of all (Com. Dig. "Estates" (G. 6); *Jurdain v. Steere*, Cro. Jac. 83); and on the death of one of the lessors, the lessee's interest will continue, even though the lease be at will, as tenant to the survivor or survivors, who will, of course, be entitled to the whole rent. (*Henstead's case*, 5 Co. R. 10; *Doe v. Summersett*, 1 B. & Ad. 135, 140.) But their joint demise operates both as a demise by each of his own share and as a demise by all of the whole; and, therefore, if joint tenants jointly demise from year to year, each of them, on giving due notice to quit, may recover his several share in ejectment (*Doe v. Chaplin*, 3 Taunt. 119), or put an end to the tenancy as to the whole, so that ejectment may be maintained, although the notice to quit be given by one of the lessors only (*Doe v. Summersett*, *supra*), for the tenant holds the premises only so long as *he and they all* shall agree.

Unlike joint tenants who have one *joint* freehold, tenants in common have *several* freeholds. They hold by several titles, and not by a joint title (Litt. s. 292); or, as Lord Coke expressed it, by one title and several rights. (Co. Litt. 189 a.) A tenant in common may therefore lease his undivided share for any interest commensurate with his own, either to a stranger or his companion (*Story v. Johnson*, 2 Yo. & Coll. Ex. 586; *Snelgar v. Henston*, Cro. Jac. 611; *Leigh v. Dickeson*, 15 Q. B. D. 60; 54 L. J., Q. B. 18); or with his co-tenants may concur in one lease, which although inoperative as a joint demise of the whole of their estate, their interests being several and distinct (Com. Dig. "Estates" (K. 8); *Heatherley v. Weston*, 2 Wils. 232; *Burne v. Cambridge*, 1 Moo. & Rob. 539), will operate as a distinct demise by each of his own part and a cross confirmation of each for the part of the other, without any estoppel, an interest passing from each lessor. (*Mantle v. Wollington*, Cro. Jac. 166; *Brooks v. Foxcraft*, Clayt. 137; *Jurdain v. Steere*, Cro. Jac. 83; Bac. Ab. "Joint Tenants" (H. 1); and see *per Cur.* in *Thompson v. Hakecell*, 35 L. J., C. P. 18; 19 C. B., N. S. 713.)

Tenants in common.

Where two or more females, or female heirs of females, together form an heir to lands or tenements of inheritance, they are called in law coparceners, or more briefly parceners. (Litt. s. 254, 170 a; Bac. Ab. "Coparceners;")

Coparceners.

Com. Dig. "Parceners," A. I. 3.) Their estate, "the rarest kind of inheritance that is in the law" (Co. Litt. 164 a), partakes of the properties both of a joint tenancy and of a tenancy in common. They constitute one heir, possessing, as to strangers, like joint tenants, but one freehold; but for the purpose of leasing they, like tenants in common, have several freeholds (Vin. Ab. "Parceners;" Litt. s. 241; Co. Litt. 163 b, 164 a), and may make leases precisely in the same manner. (*Milliner v. Robinson*, Moore's Cases, 682.) But they cannot sue separately for their individual shares of rent. (*Decharms v. Horwood*, 10 Bing. 526.)

Lords of
manors.

When a copyhold tenement escheats, is surrendered, or becomes forfeited to the lord, he may make a new grant of it by copy, in fee, or for any less estate, provided there be within the manor a custom for that purpose. (*R. v. Hornchurch*, 2 B. & Al. 189; *Badger v. Ford*, 3 B. & Al. 153; *R. v. Wilby*, 2 M. & S. 504; *Lascelles v. Onslow*, 36 L. T. 459; *Cole, Ejec.* 632.) But the custom, which is the life of a copyhold assurance, must be strictly followed. The ancient rent and services must be reserved, or the grant will be void as against the lord's successor. (*Doe v. Strickland*, 2 Q. B. 792.) By custom the lord may lease for years portions of the wastes of a manor (*Lord Northwick v. Stanway*, 3 Bos. & P. 346); but a custom to lease without restriction is bad (*Arlett v. Ellis*, 7 B. & C. 346; *Badger v. Ford, supra*), being inconsistent with the rights of the commoners. By statute, lords of manors may, with the consent of three-fourths of the commoners, lease any part, not exceeding one-twelfth, of the wastes, for any period not exceeding four years, for the best rent that can be got at public auction, the same to be applied in draining, fencing, and improving the residue. (13 Geo. 3, c. 81, s. 15.)

13 Geo. 3,
c. 81.

Copyholders.

Unless authorized by the custom of the manor (*Wells v. Partridge*, Cro. Eliz. 469; 6 Vin. Ab. 118), or the express licence of the lord (*Jackman v. Hoddesden*, Cro. Eliz. 351; *Kensey v. Richardson*, id. 728), a copyholder cannot lease his copyhold tenement for more than a year, or make a lease evading or exceeding the custom or licence, if there be one, without forfeiting his estate (1 Watk. Cop. 327; 1 Scriv. Cop. 544; *Cole, Ejec.* 615); but he may lease for a shorter term than that permitted by the licence or custom, in accordance with the rule, *omne majus continet in se minus* (*Goodwin v. Longhurst*, Cro. Eliz. 535; *Easton v. Pratt*, 33 L. J., Ex. 233); and a lease not warranted by the custom

or licence will be good against all but the lord (*Doe v. Tressider*, 10 L. J., Q. B. 160), who may enforce or waive the forfeiture at his option (*Doe v. Bousfield*, 6 Q. B. 422; 14 L. J., Q. B. 42), whilst the privilege of leasing for one year without licence is allowed to copyholders by the general custom of the kingdom. (*Frosel v. Welch*, Cro. Jac. 403.) There are probably exceptions (1 Prest. Abs. 202); and in many manors a special custom authorizes leases for years or for life, and a certain number of years after. (1 Scriv. 457.) All the powers to authorize and grant leases contained in the Settled Estates Act, 1877 (40 & 41 Vict. c. 18, s. 46, *ante*, pp. 29, 30), are extended to the lords of settled manors to give licences to their copyhold and customary tenants to grant such leases as may be granted of freehold hereditaments under that Act. (Id. sect. 9.) Similarly, under the Settled Land Act, 1882, a tenant for life of a settled manor may grant to a tenant of copyhold or customary land a licence to make such lease of that land as by the Act a tenant for life is empowered to make of freehold land. (45 & 46 Vict. c. 38, s. 14.) But to grant or refuse a licence is entirely in the discretion of the lord (*Reg. v. Hall*, 9 A. & E. 339); though in that case *Ballard v. Agard* (6 Vin. Ab. 240, "Copyholds," Y, e) was cited, as deciding that a suit would lie in equity to compel a lord to grant a licence to lease; but that authority is not satisfactory.

Persons having a present right to the future enjoyment of an estate as remaindermen or reversioners, expectant either upon an estate for years, for life, or in tail, may make leases which will take effect in possession on the determination of the preceding estate. (*Palmer v. Thorpe*, Cro. Eliz. 152.)

Reversioners
and remain-
dermen.

In consequence of the improvident grants of preceding monarchs, it was found necessary, in the reign of Queen Anne, to restrain the demising power of herself and successors. It was accordingly enacted that all leases of Crown lands or tenements (except advowsons or vicarages) should be void, unless made for a term not exceeding thirty-one years or three lives, or some term of years determinable upon one, two, or three lives (1 Anne, stat. 1, c. 7, s. 5); or, in the case of building or repairing leases, fifty years or three lives (id. s. 6), subject to certain conditions and restrictions, none of which apply to her Majesty's private estates. (25 & 26 Vict. c. 37, s. 2.) Comparatively recent legislation has vested most of the

The Crown.

1 Anne,
stat. 1, c. 7.

Crown lands in the Commissioners of Woods and Forests, who are empowered to grant leases for any term not exceeding thirty-one years, or building leases not exceeding ninety-nine years (10 Geo. 4, c. 50, ss. 22—26), subject to certain conditions. (Id. ss. 27—33.)

Government
departments.

Government departments, authorized to acquire, sell, exchange, or demise lands for public purposes, may make leases, the terms of which are in strict compliance with the particular statute under which they act.

Leases of lands belonging to the Duchy of Cornwall are regulated by 26 & 27 Vict. c. 49, and 31 & 32 Vict. c. 35; those belonging to the Duchy of Lancaster by 48 Geo. 3, c. 73; 1 & 2 Geo. 4, c. 52; and leases of mines, minerals, and quarries belonging to the Crown in Dean Forest by 1 & 2 Vict. c. 43, as amended by 24 & 25 Vict. c. 40.

Corporations.

Unless restrained by statute (public or private), or by their several bye-laws, corporations may grant leases (which must be by deed under their common seal, *Finlay v. Bristol and Exeter Railway Company*, 21 L. J., Ex. 117; and by their proper title of incorporation, 1 Kyd, Corp. 234—237), which will be binding on their successors for any term consistent with their own estate. (*Smith v. Barrett*, Sid. 161.) And although a lease by a corporation not under its common seal is void, yet occupation and payment of rent under the void instrument by the tenant will create an implied tenancy from year to year upon such of the terms of the instrument as may be applicable to such a tenancy, and the corporation may maintain an action for a breach thereof. (*Wood v. Tate*, 2 B. & P., N. R. 247; *Ecclesiastical Commissioners v. Merril*, L. R., 4 Ex. 162; 38 L. J., Ex. 93.) So, specific performance of a parol contract for a lease by a corporation will be decreed if there has been part performance. (*Steeven's Hosp. v. Dyas*, 15 Ir. Ch. Rep. 405.)

Ecclesiastical
and eleemo-
synary.

By the common law, ecclesiastical corporations *aggregate*, as the dean and chapter of a cathedral, and eleemosynary corporations *aggregate*, as the master and fellows of a college, were capable of granting leases for any term without the consent or confirmation of any person whomsoever. But ecclesiastical corporations *sole*, consisting of one person, as a bishop, could only make leases co-durable with their own estate, except with the consent or confirmation of such person as the law required, *concurrentibus his quæ in jure requiruntur* (Co. Litt. 44 a; 2 Bla. Com. 318—321;

Shep. Touch. 281), which being obtained they could exercise equally unlimited powers. (*Grindal's case*, 4 Leon. 78.)

This unreasonable power of leasing tending to the impoverishment of their successors, the salutary control of parliament was exercised in confining within more reasonable limits the latitude allowed by the common law. Hence originated numerous statutes known to lawyers as enabling and disabling or restraining Acts. The first of these, known as the enabling statute of 32 Hen. 8, c. 28, empowered all corporations sole (except parsons and vicars) to make leases by deed *indented*, to commence from the day of making, of lands most commonly let for twenty years before, for a term not exceeding twenty-one years or three lives (not for both), which, without confirmation, were binding upon their successors: the usual and customary rent for the preceding twenty years being reserved, any old lease in being being first absolutely surrendered or within a year of its expiration: and such leases not to be without impeachment of waste. (32 Hen. 8, c. 28, ss. 1, 2, 4; see also 5 Geo. 3, c. 17, s. 1.) With confirmation, long leases made by corporations sole continued, as far as that Act was concerned, to be good against their successors, as they had been at common law. (Gibs. 744.)

Enabling
Act, 32 Hen.
8, c. 28.

Accordingly, by disabling statutes of Elizabeth, first archbishops and bishops (1 Eliz. c. 19, s. 5), and next, all other corporations, whether sole or aggregate, were disabled altogether from leasing ecclesiastical property for more than twenty-one years or three lives. (13 Eliz. c. 10, s. 3.)

Disabling
Acts, 1 Eliz.
c. 19;
13 Eliz. c. 10.

But the 14 Eliz. c. 11, ss. 17—19, excepted out of the restrictions of the 13 Eliz. c. 10, leases of houses (not being the capital or dwelling-houses of the lessors) situate in cities, boroughs, corporate or market towns, which, subject to certain conditions to be strictly observed, all ecclesiastical and eleemosynary corporations sole (except bishops) may demise, with not more than ten acres of land appurtenant, for any term not exceeding forty years. It should be observed that, although all leases not made in accordance with the two above-mentioned disabling statutes were thereby declared "utterly void," the Courts, construing void to mean "void at election," have held such leases valid during the life of the corporation sole (2 Shep. Touch. 283; *Salisbury's case*, 10 Co. R. 58 b, 60 b), or of the head of the corporation aggregate (Co. Lit. 45 a), by whom they were granted, and voidable only by the successors, who have

Exception
under 14 Eliz.
c. 11, s. 17.

Statute of
Limitations.
3 & 4 Will. 4,
c. 27.

18 Eliz. c. 11,
s. 2.

5 & 6 Vict.
c. 27.

equal power to confirm them. (*Per* Holroyd, J., *Edwards v. Dick*, 4 B. & Al. 217; *Doe v. Banks*, 4 B. & Al. 407; *Pennington v. Cardale*, 27 L. J., Ex. 438; *Doe v. Tanriere*, 18 L. J., Q. B. 49.) But the Statute of Limitations (3 & 4 Will. 4, c. 27) runs against the successors from the grant of the lease, and not from their election to avoid it. Where the governors of a hospital granted a lease in 1783 for ninety-nine years, an action to set the lease aside in 1876 was held barred by the statute. (*Governors of Magdalen Hospital v. Knotts*, 4 App. Ca. 324; 48 L. J., Ch. 579; *Churcher v. Martin*, 42 Ch. D. 312; 61 L. T. 113.) Such leases are, however, binding upon the lessees who, having accepted them, are justly estopped from repudiating them. By another statute all the ecclesiastical and other persons mentioned in the 13 Eliz. c. 10 (which did not, as we have seen, include archbishops and bishops), were restrained from making any new lease where the old one was not to be expired, surrendered, or ended within three years after the making of such new lease (18 Eliz. c. 11, s. 2); the object being clearly to restrain leases in reversion. Confirmation, being excluded in cases within the disabling statutes of Elizabeth, became of practical use only to (1) parsons, vicars (specially excepted out of 32 Hen. 8, c. 28, by sect. 4), and perpetual curates who have received Queen Anne's bounty (held within same exception, *Doe v. Thomas*, 9 A. & E. 556), who cannot, nor ever could, make *any* lease without confirmation; and (2) to bishops who, not being included in the restraint of 18 Eliz. c. 11, upon concurrent leases, may still in some cases make such leases with the consent of the dean and chapter. At common law, therefore, the incumbent of a benefice could not grant any lease which would operate as a valid demise for a longer term than his own incumbency (*Wheeler v. Heydon*, Cro. Jac. 328; *Price v. Williams*, 1 M. & W. 6; *Doe v. Carter*, Ry. & Moo. 237; *Doe v. Yarborough*, 1 Bing. 24), until the 5 & 6 Vict. c. 27, empowered all incumbents, with the consent of the bishop and patron, and in the case of copyhold lands, where a lease cannot be made without his licence, with the consent of the lord of the manor, to lease the lands belonging to their benefices (except the parsonage and ten acres of glebe) on farming leases for fourteen, or in cases where the lessee shall covenant to improve the demised premises at his own expense, twenty years, subject to certain restrictions im-

posed in the interests of their successors. This Act does not extend to glebe lands, which have been usually let on lease by incumbents (*Jenkins v. Green*, 28 L. J., Ch. 822); so that a rector, with the consent of the patron and bishop, may still exercise his common law power of leasing his glebe, subject to the provisions of 13 Eliz. c. 10. Further powers, in addition to existing powers of leasing, have been given by the Ecclesiastical Leasing Act, 1842, as amended in 1858, to all ecclesiastical corporations, aggregate or sole (except any college or corporation of vicars choral, priest vicars, senior vicars, custos, and vicars or minor canons, and except any ecclesiastical hospital, or the master thereof), who may, with certain consents, grant building, repairing, or improving leases for ninety-nine years, and leases of mines or quarries, running water, way-leaves, and other rights and easements for sixty years, subject to certain restrictions and conditions (5 & 6 Vict. c. 108, ss. 1—9, 18, 20—32); or where the Ecclesiastical Commissioners are satisfied that it is to the permanent advantage of the estate, in such manner as the commissioners may think proper. (21 & 22 Vict. c. 57, s. 1.)

5 & 6 Vict.
c. 108,
amended by
21 & 22 Vict.
c. 57.

By 14 & 15 Vict. c. 104 (continued and amended by 17 & 18 Vict. c. 116; 19 & 20 Vict. c. 74; 20 & 21 Vict. c. 74; 22 & 23 Vict. c. 46; 23 & 24 Vict. c. 124; 24 & 25 Vict. cc. 105, 131; 30 & 31 Vict. c. 143; 31 & 32 Vict. cc. 111, 114; 32 & 33 Vict. c. 85; 38 & 39 Vict. c. 72), ecclesiastical corporations, sole or aggregate, with the written approval of the Church Estate Commissioners, may lease lands acquired under that Act from year to year, or for any term not exceeding fourteen years; or mining and building leases upon such terms as the commissioners may think fit. (Sect. 9.) A similar provision as to acquired lands is contained in the 9th section of the Ecclesiastical Leasing Act, 1858.

Episcopal and
Capitular
Estates Act,
14 & 15 Vict.
c. 104.

By 23 & 24 Vict. c. 124, s. 8, no lease of lands assigned as the endowment of any see under this Act can be granted by the archbishop or bishop, otherwise than from year to year, or for any term not exceeding twenty-one years, subject to similar conditions to those contained in the "Act for better enabling Incumbents of Ecclesiastical Benefices to demise" (5 & 6 Vict. c. 27, *ante*, p. 46); but with the approval of the estates committee of the Ecclesiastical Commissioners, mining, building, or other leases may be granted upon such terms as they may think fit.

23 & 24 Vict.
c. 124.

24 & 25 Vict.
c. 105,
amended by
25 & 26 Vict.
c. 52.

None of the previous disabling or restraining Acts (except 5 & 6 Vict. c. 27) extended to copyholds belonging to ecclesiastical benefices, which the rectors, vicars, &c., having power so to do, were accustomed to grant and lease for lives and long terms of years to the prejudice of their successors; and therefore by the 24 & 25 Vict. c. 105, amended by 25 & 26 Vict. c. 52, it was rendered unlawful for any rector, vicar, &c., who after 6th August, 1861, should become possessed of any manors, lands, &c., belonging to any ecclesiastical benefice, to make any grant or lease thereof in any other way than pursuant to 5 & 6 Vict. cc. 27, 108; or 21 & 22 Vict. c. 57. By section 2, leases made and rights acquired before this Act are expressly protected.

In every instance it is most necessary to turn to the Acts themselves for details.

Civil corporations.
21 & 22 Vict.
c. 44; 23 & 24
Vict. c. 59.

By the Universities and College Estates Acts, 1858 and 1860, the Universities of Oxford, Cambridge, Durham, and their respective colleges, together with the colleges at Winchester and Eton, which are lay or civil corporations aggregate (*Rex v. Cambridge*, 3 Burr. 1656), are empowered to grant leases, generally, for any term not exceeding twenty-one years; building and repairing leases, ninety-nine years; running water, wayleaves, other rights and easements, and mining leases, sixty years, without the consent of any other person or persons whomsoever, but subject to conditions imposed for the protection of their successors. But they are not restrained from granting any leases which they might legally have granted before these Acts. The power of leasing possessed by the University of London and other colleges is regulated by their private statutes, charters and bye-laws.

Municipal corporations.

Municipal corporations cannot demise their lands for more than thirty-one years, without consent (45 & 46 Vict. c. 50, s. 108), except in the case of renewed leases (sect. 110; *Att.-Gen. v. Yarmouth*, 21 Beav. 625), and building leases for terms not exceeding seventy-five years. (Sect. 108.) The consent formerly required was that of the Lords of the Treasury, but a later Act has substituted the Local Government Board. (51 & 52 Vict. c. 41, s. 72.)

Parish officers.

The many inconveniences caused by the difficulty of making valid leases of parish property to create a tenancy other than from year to year (*Doe v. Terry*, 4 A. & E. 274)—neither churchwardens nor overseers (except in Lon-

don, *Warner's case*, Cro. Jac. 532), jointly or severally, having any legal interest to demise,—were to some extent remedied by 59 Geo. 3, c. 12, which vests all real property belonging to the parish in the churchwardens and overseers in succession, as a corporation (sect. 17), and empowers them jointly (*Woodcock v. Gibson*, 4 B. & C. 462), with the consent of the vestry, to let portions of land, not exceeding twenty acres each, at such rent and for such terms as the vestry shall determine. (Sect. 12.) This Act does not apply to copyhold lands (*Doe v. Foster*, 3 C. B. 215); its provisions must be strictly observed (*Doe v. Gower*, 21 L. J., Q. B. 57); and “apply to those cases only where the rents are applicable solely to parochial purposes which are under the control of the parish officers.” (*Per Parke, B., Uthcatt v. Elkins*, 13 M. & W. 777.)

Prior to the passing of the Charitable Trusts Act, 1853, which, with amending Acts, now regulates the estates of charities, trustees of charities might grant such leases as were beneficial to the lasting interests of the charity; if otherwise, as where there was inadequacy of rent, unreasonableness of term, absence of necessary covenants, &c., the Chancery Division, as paramount trustee, would set them aside at any distance of time (*Att.-Gen. v. Cross*, 3 Mer. 524; *Att.-Gen. v. Owen*, 10 Ves. 555; *Att.-Gen. v. Brooks*, 18 Ves. 319; *Att.-Gen. v. Hotham*, 3 Russ. 415), until protected by the Statute of Limitations (3 & 4 Will. 4, c. 27, ss. 24—27), which extends to charities. (*Mag. Coll., Oron v. Att.-Gen.*, 26 L. J., Ch. 620.)

Trustees of charities.
16 & 17 Vict.
c. 137,
amended by
18 & 19 Vict.
c. 124, and
32 & 33 Vict.
c. 110.

Now, by 16 & 17 Vict. c. 137, leases authorized by any two of the Charity Commissioners sitting as a board (sect. 6), have the like effect and validity as if authorized by the express terms of the trust affecting the charity. (Sects. 21, 26; and see Tudor's Charitable Trusts, 3rd ed. 257, 484.)

By 18 & 19 Vict. c. 124, all lands, &c. then vested in the “Treasurer of Public Charities,” became vested in like manner and upon the same trusts in the secretary of the board as a corporation sole, under the name of “The Official Trustee of Charity Lands.” (Sect. 15.) By sect. 16, the acting trustees of every charity were empowered to grant all such leases of land belonging thereto and vested in the official trustee, as they could duly have granted if the same land were legally vested in themselves.

(And see sect. 29 ; *Bishop of Bangor v. Parry*, [1891] 2 Q. B. 277.)

By 32 & 33 Vict. c. 110, s. 12, a clear majority of the trustees of any charity assembled at a meeting of their body, duly constituted, having power to lease any property of the charity, have power, on behalf of their trustees and of the official trustee, where his concurrence would be otherwise required, to do all things requisite for carrying such lease into legal effect.

45 & 46 Vict.
c. 80.

By the Allotments Extension Act, 1882 (45 & 46 Vict. c. 80, s. 4), all trustees of lands for the benefit of the poor of any parish, whereof the rent or produce is distributed in gifts of money, doles, fuel, or other articles of necessity, shall, where such lands are not otherwise used for the benefit of the parish as a recreation ground, or otherwise for the enjoyment or general benefit of the inhabitants, take proceedings, as in the Act mentioned, for letting such lands to cottagers, labourers, and others.

Sanitary
authorities for
allotments.

Under the Allotments Act, 1887 (50 & 51 Vict. c. 48), sanitary authorities may, by purchase or hire, acquire suitable land, whether within or without their district, for the purpose of letting it in allotments "to persons belonging to the labouring population resident in the district." (Sect. 2.) When acquired the land may be let under regulations framed by the sanitary authority and approved by the Local Government Board. (Sects. 6, 7.)

County
Council under
Small Hold-
ings Act,
1892.

A county council may hire land on lease instead of purchasing it for the purpose of letting it in accordance with the provisions of the Small Holdings Act, 1892 (55 & 56 Vict. c. 31, s. 2), and may sell or let the land so acquired in small holdings. (Sect. 4.)

Trustees of
bankrupts.
46 & 47 Vict.
c. 52.

By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), the property of the bankrupt, divisible amongst his creditors, [which comprises the capacity to exercise all such powers over property as might have been exercised by the bankrupt for his own benefit (sect. 44, sub-sect. 2 (ii.)),] vests on his appointment in the person for the time being filling the office of trustee (sect. 54), who is expressly authorized to exercise any powers the capacity to exercise which is vested in him under this Act. (Sect. 56, sub-sect. 4.) The trustee has, therefore, exactly the same power to grant leases as the bankrupt had at the commencement of his bankruptcy.

Receivers.

Receivers appointed by the Court may in ordinary

cases, without applying for the sanction of the Court, grant such parol leases as are authorized by the second section of the Statute of Frauds, that is to say, for a year certain or for any term not exceeding three years. (*Shuff v. Holdaway*, 2 Dan. Ch. Pr. 1690, 6th ed. ; 1 Seton, 675 ; Kerr, 166.) For a longer term the receiver must obtain the direction of the Court, and the lease itself must be executed by the person in whom the legal estate or power of leasing is vested ; for although a receiver may execute a lease which will operate by way of estoppel, he cannot pass the legal estate. (*Evans v. Matthias*, 26 L. J., Q. B. 309 ; 7 E. & B. 602 ; Kerr, 167.)

A mere bailiff has no interest in, and cannot lease, his employer's lands otherwise than at will (*Shopland v. Ryoler*, Cro. Jac. 55 ; *Drury v. Fitch*, Hutt. 16 ; *Knipe v. Palmer*, 2 Wils. 130) ; but a power may be conferred on him for the purpose. A farm bailiff, accustomed to let from year to year upon the ordinary terms, and to receive rents, has no authority in law to let upon unusual terms unknown to the owner (*Turner v. Hutchinson*, 2 F. & F. 185) ; and a steward or land agent has no general authority enabling him to grant leases of farms for terms of years. (*Collen v. Gardner*, 21 Beav. 540 ; *Mortal v. Lyons*, 8 Ir. Ch. R. 117.)

An agent, acting as manager of property, may make a lease binding on his principal (*Hamilton v. Clanricarde*, 1 Bro. P. C. 341), if it be within the scope of his authority (*Fenn v. Harrison*, 3 T. R. 757),—which must be by deed if the lease be by deed (*Harrison v. Jackson*, 7 T. R. 207), but need not even be in writing if the lease be by parol. (*Coles v. Trecothick*, 9 Ves. 250 ; *Heard v. Pilley*, L. R., 4 Ch. 548.) If an agent make a lease without sufficient authority, his principal may subsequently adopt his act by ratification in writing (*Fitzmaurice v. Bayley*, 6 E. & B. 868), or without writing (*Rodwell v. Eden*, 1 F. & F. 542) ; but if he do not do so, the agent, having executed a lease professedly as attorney for another, may be sued for a breach of his warranty that he had sufficient authority : such a warranty being implied. (*Simons v. Patchett*, 7 E. & B. 568 ; *Pow v. Davis*, 30 L. J., Q. B. 257 ; *Spedding v. Nevell*, 38 L. J., C. P. 133 ; L. R., 4 C. P. 212.) An agent should always sign as agent to avoid personal liability (*Clay v. Southen*, 21 L. J., Ex. 202 ; *Parker v. Winlow*, 7 E. & B. 942), and in the name of his principal. (*White v. Cuyler*,

6 T. R. 176; *Cooke v. Wilson*, 26 L. J., C. P. 15.) It seems doubtful whether an agent employed to let a house has implied authority to let persons into possession; though on principle it is submitted he ought to have, and slight evidence will be sufficient to prove that he has express authority. (*Slack v. Crewe*, 2 F. & F. 59.) An agent's authority, though under seal, may be revoked without deed. (*Rex v. Wait*, 11 Price, 518; *Manser v. Back*, 6 Hare, 443.)

Executors and
adminis-
trators.

An executor or administrator may sell or underlet the property which devolves on him in either of those capacities (Bac. Ab. "Leases," I, 7); but whilst an executor may do so *before* probate (*Roe v. Summerset*, 2 W. Bl. 692), an administrator cannot until *after* he has obtained the letters of administration, which alone constitute his title. (1 Wms. Exors. 354.) A lease by one of several executors (*Doe v. Sturges*, 7 Taunt. 222, *sub nom. Doe v. Hayes*) or administrators (*Jacomb v. Harwood*, 2 Ves. Sen. 265) is good. The ordinary duty, however, of an executor or administrator is to sell and not to underlet, and anyone who accepts an underlease must see that a fair necessity has arisen for such a course. (*Oceanic Steam Co. v. Sutherland*, 16 Ch. D. 236; 50 L. J., Ch. 308.) An executor or administrator may not grant leases with an option to purchase. (*Oceanic Steam Co. v. Sutherland*, *supra*; *ante*, p. 18.) If a term of years have been specifically bequeathed, a person proposing to take a lease from the executor ought to satisfy himself that the executor has not assented to the bequest, as in such case his power of leasing is at an end, and the legatee may maintain ejectment. (*Doe v. Guy*, 4 Esp. 154; *Johnson v. Warwick*, 17 C. B. 516; *Fenton v. Clegg*, 9 Ex. 680; 2 Wms. Exors. 1275, 6th ed.) The marriage of an executrix or administratrix, at common law, transfers to the husband the *whole* right of administration, and he must be the demising party in all leases. (*Thrustout v. Coppin*, 2 W. Bl. 801; see *post*, p. 61.) Leases by executors or administrators are voidable in equity, unless shown by the lessees to be a due administration of the assets. (*Drohan v. Drohan*, 1 Ball & B. 185; *Keating v. Keating*, Ll. & Go. 133.) An administrator *durante minoritate* may demise during the non-age of the executor, who on attaining his majority may avoid the lease for the residue of the term granted. (*Finch's case*, 6 Rep. 68 a; *Prince's case*, 5 Rep. 29 a; 38 Geo. 3, c. 87, s. 6.) Executors who have refused

to administer cannot demise after administration has been granted to another. (*Broker v. Charter*, Cro. Eliz. 92.)

The leasing power of mortgagors and mortgagees depends upon whether their security was executed before or after the 1st of January, 1882, that is to say, whether they are governed by the common law rule, or are entitled to exercise the powers conferred by the Conveyancing Act, 1881. (44 & 45 Vict. c. 41.)

Mortgagors and mortgagees—under security dated before 1st Jan. 1882.

In every case, and whatever the date of the security, leases by a mortgagor are binding on the mortgagee, if made prior to the mortgage. (*Moss v. Gallimore*, 1 Sm. L. C. 604, 9th ed.; *Rogers v. Humphreys*, 4 A. & E. 299.) The mortgage is merely a conveyance of the reversion, with the ordinary consequences (so far as the lessees are concerned) of such a conveyance, except that, by virtue of sect. 25, sub-s. 5, of the Judicature Act, 1873, until the mortgagee gives notice of his intention to enter into possession or receipt of rents, the mortgagor may maintain ejectment or sue for the rents in his own name. (*Yorkshire Banking Co. v. Mullan*, 35 Ch. D. 125; 56 L. J., Ch. 562.)

Lease before mortgage.

As to leases made by a mortgagor after the mortgage, when either the mortgage is dated before the Conveyancing Act, 1881, or the provisions of that Act are otherwise excluded, such leases, except made under an express power in the mortgage deed (*Beran v. Habgood*, 30 L. J., Ch. 107), though good by way of estoppel between the parties (*Doe v. Thompson*, 9 Q. B. 1037; *Cuthbertson v. Irving*, 28 L. J., Ex. 306), are void as against the mortgagee, who may at once, without notice or demand, eject the lessee. (*Thunder v. Belcher*, 3 East, 449; *Keech v. Hall*, 1 Doug. 21; 1 Sm. L. C. 545; *Pope v. Biggs*, 9 B. & C. 253.) To this rule there is an exception in the case of a tenant of land who, as against the mortgagor, would be entitled to compensation for crops, improvements, tillages, or other matters connected with the land, as, under the Tenants' Compensation Act, 1890, such a tenant is entitled to six months' notice before eviction. (53 & 54 Vict. c. 57, s. 2.)

Leases after mortgage.

The mortgagee may adopt the act of the mortgagor in granting the lease by acts, other than mere notice to the lessee, evidencing the creation by mutual consent of a tenancy between the mortgagee and tenant. (*Evans v. Elliott*, 9 A. & E. 342; *Brown v. Storey*, 1 M. & G. 117.) Where the mortgagor has subsequently to the mortgage leased the property for a term, and the mortgagee after-

wards asserts his paramount title, and claims payment of the rent to himself, to which claim the tenant assents, this does not affirm the lease, but creates between the parties a new tenancy from year to year (*Corbett v. Plowden*, 25 Ch. D. 678; 54 L. J., Ch. 109; *Underhay v. Read*, 20 Q. B. D. 209; 57 L. J., Q. B. 129) upon the terms of the lease unless expressly varied. But merely remaining in possession after receipt of a notice from the mortgagee to pay rent to him is no evidence of assent to such a claim. (*Towerson v. Jackson*, 65 L. T. 332; [1891] 2 Q. B. 484; 61 L. J., Q. B. 36.)

If, without any express power, the mortgagor grant a lease, the tenant, during his possession, may not dispute the mortgagor's right to demise; for it is valid by way of estoppel. (*Alchorne v. Gomme*, 3 Bing. 54.)

On the other hand, so long as the equity of redemption is not foreclosed, the mortgagee cannot demise so as to bind the mortgagor, unless to avoid an apparent loss (*Hungerford v. Clay*, 9 Mod. 1; *Franklin v. Ball*, 34 L. J., Ch. 153); so that where lands in mortgage are to be demised, both mortgagor and mortgagee ought to concur in the lease for the security of the tenant. (*Doe v. Adams*, 2 Cr. & J. 232; *Doe v. Bucknell*, 8 C. & P. 566; *Carpenter v. Parker*, 3 C. B., N. S. 206.)

A tenant for years under an agreement for a lease made subsequently to a mortgage is entitled to redeem the mortgage. (*Tarn v. Turner*, 39 Ch. D. 456; 57 L. J., Ch. 1085.)

Security dated
after 1st Jan.
1882.

The leasing powers of mortgagors and mortgagees under mortgages made after 1st of January, 1882 (*Re Nugent and Riley*, 49 L. T. 132), are governed by 44 & 45 Vict. c. 41, s. 18, which provides that the powers conferred by the Act may be excluded or varied by the mortgage deed, or otherwise in writing (sub-sect. 13), or more extended leasing powers may be conferred (sub-sect. 14), provided they do not enable the granting of such a lease as could not have been granted by the mortgagor and mortgagee with the consent of all the incumbrancers if the Act had not been passed. (Sub-sect. 15.) But subject to any such modifications, a *mortgagor* in possession has, as against every incumbrancer, power to make and contract for such leases and agreements for leases as are hereinafter mentioned (sub-sects. 1, 12, 17); and a *mortgagee* in possession has the like power as against all prior incumbrancers and the

Leases under
Conveyancing
Act, 1881.

mortgagor. (Sub-sect. 2.) The leases authorized are agricultural or occupation leases not exceeding twenty-one years, and building leases not exceeding ninety-nine years. (Sub-sect. 3.) There is no power to grant a mining lease, unless expressly authorized by the mortgage.

The regulations contained in the following sub-sections of sect. 18 must be observed in the granting of such leases, otherwise they will not operate under the section, but only in conformity with the previous law.

(5.) Every such lease shall be made to take effect in possession not later than twelve months after its date. [This section does not require the lease to be by deed, but if the term exceed three years the statute 8 & 9 Vict. c. 106, s. 3, does. Any question as to what constitutes a lease in possession is avoided by the latitude of twelve months. Compare the requirements of the Settled Land Acts, *ante*, p. 37.]

(6.) Every such lease shall reserve the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but without any fine being taken. [See as to best rent *ante*, p. 28, and 3 Dav. Conv. 487, and, in the case of a building lease, sub-s. 10. A mortgagee in possession who grants an improvident lease is liable, on redemption, to account for the difference between the actual rent and that which he might have obtained. Thus, where a mortgagee in possession of a public-house let the premises, with a stipulation by the tenant to buy all his beer from the mortgagee, he was held liable to account for the increased rent which might have been obtained if the public-house had been let without the restrictive covenant. (*White v. City of London Brewery Co.*, 42 Ch. D. 237; 58 L. J., Ch. 855.)]

(7.) Every such lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified, not exceeding thirty days.

(8.) A counterpart of every such lease shall be executed by the lessee, and delivered to the lessor, of which execution and delivery the execution of the lease by the lessor shall, in favour of the

lessee, and all persons deriving title under him, be sufficient evidence.

- (9.) Every such building lease shall be made in consideration of the lessee, or some person by whose direction the lease is granted, having erected or agreeing to erect, within not more than five years from the date of the lease, buildings, new or additional, or having improved or repaired buildings, or agreeing to improve or repair buildings, within that time, or having executed, or agreeing to execute, within that time on the land leased an improvement for or in connexion with building purposes. [This is an expansion of the definition of a building lease contained in sect. 2 (x).]
- (10.) In any such building lease a peppercorn rent, or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years, or any less part of the term.
- (11.) In case of a lease by the mortgagor he shall, within one month after making the lease, deliver to the mortgagee, or, where there are more than one, to the mortgagee first in priority, a counterpart of the lease duly executed by the lessee; but the lessee shall not be concerned to see that this provision is complied with. [The failure to deliver a counterpart does not affect the validity of the lease.]
- (12.) A contract to make or accept a lease under this section may be enforced by or against every person on whom the lease, if granted, would be binding.
- (13.) This section applies only if and as far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage deed, or otherwise in writing, and shall have effect subject to the terms of the mortgage deed, or of any such writing, and to the provisions therein contained. [In practice the leasing power of the mortgagor is either excluded, or made exerciseable only with the consent of the mortgagee. An unauthorized lease will have only the same operation as if the Act had not been passed.]
- (17.) The provisions of this section referring to a lease

shall be construed to extend and apply, as far as circumstances admit, to any letting, and to an agreement, whether in writing or not, for leasing or letting. [The meaning of this sub-section, which seems inconsistent with the earlier sub-sections, is not quite clear. In *Reveley v. Thomas* the Court of Appeal (11th May, 1888), without actually deciding the point, inclined to the opinion that the words, "so far as circumstances admit," exclude the necessity for a covenant for payment of rent or condition of re-entry in a parol letting, and, of course, also the necessity for a counterpart.]

The Act does not in terms authorize a lease without impeachment of waste. The ordinary power to lease does not enable the donee to exempt the lessee from liability for waste either by the introduction in the lease of an express clause, or by means of the particular limitations to be created (2 Chance, 335); but no act which is authorized by the terms of the power can be punishable as waste. (*Morris v. Rhydydefed Colliery Co.*, 3 H. & N. 473, 885; 27 L. J., Ex. 48; 28 *ib.* 119.) Under a power to grant building leases, the lessee may be authorized to pull down old buildings in order to erect new ones. (*Jones v. Verney, Willes*, 169.)

Leases under Act not to authorize waste.

A lease granted in conformity with the Act is binding upon all the persons interested in the property. (*Wilson v. Queen's Club*, [1891] 3 Ch. 522). It will operate as if they had all joined in the lease, and the rent and the benefit of the lessee's covenants will run with the reversion. A lease granted by the mortgagor in possession creates the relationship of landlord and tenant between the mortgagee and the tenant; but until the mortgagee gives notice that he intends to exercise his rights the tenant may safely continue to pay rent to the mortgagor. (*Municipal Permanent, &c. Building Society v. Smith*, 22 Q. B. D. 70; 58 L. J., Q. B. 61.) Any collateral agreement between the mortgagor and the tenant, as, for example, that the latter should retain his rent towards repayment of an advance to the mortgagor, will not bind the mortgagee. (*Ib.*) And it is submitted that any unauthorized clause in the lease itself, if it does not contravene the provisions of the Act, will not invalidate the lease or bind the mortgagee, but may be repudiated by the mortgagee.

Effect of leases under the Act.

Persons under
disability :
(a) Infants.

At common law a lease made by an infant is voidable by him on his attaining his majority (*Ketsey's case*, Cro. Jac. 320; *Ashfield v. Ashfield*, Sir W. Jo. 157), or by his heirs if he die within age. (Co. Litt. 45 b.) It has been said that a lease which is clearly for the infant's benefit is not voidable (*per* Buller, J., *Maddon v. White*, 2 T. R. 161); but the better opinion would seem to be that the infant is never precluded from disputing the lease on attaining twenty-one (2 Prest. Conv. 248; *Slator v. Trimble*, 14 Ir. C. L. R. 342), except it be made by him in a corporate capacity. (Bro. Ab. tit. "Age," pl. 80.) By custom, in some places, an infant is of full age at fifteen to make binding leases (Co. Litt. 45 b); and the Crown can never avail itself of the plea of infancy to avoid its leases. (*Re Duchy of Lancaster*, Plowd. 212.) Whilst some act of notoriety, as ejectment, entry, demand of possession, or at *least* express notice is necessary—the execution of a new lease to another lessee being insufficient—to *avoid* (*Slator v. Brady*, 14 Ir. C. L. R. 66), very slight acts, where the lease was for the benefit of the infant (*Ex parte Grace*, 1 B. & P. 377), have been held to amount to a confirmation. The act of confirmation may be by deed (*Anon.*, 2 Leon. 220), by parol (4 Leon. 4, pl. 15), inferred from acceptance of rent (*Ashfield v. Ashfield*, *ubi supra*), or implied from mere words of congratulation, as "God give you joy of your lease." (Bac. Ab. "Estate," B.)

The Infants' Relief Act, 1874 (37 & 38 Vict. c. 62), which does not apply to contracts beneficial to an infant (*Fellows v. Wood*, 59 L. T. 513), provides (sect. 2) that no action shall be brought upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age; but it is conceived that this enactment, although it applies to ratifications made after the passing of the Act of contracts made before that time (*Ex parte Kibble*, L. R., 10 Ch. App. 373), does not prevent that ratification which has always been implied from the receipt or payment, after full age, of rent reserved on a lease made to or by a person during his minority. The lease, to be good, must be the infant's own personal act: neither a lease by his agent nor his own ratification thereof will bind him. (*Doe v. Roberts*, 16 M. & W. 781.)

Leases by

Guardians by nature (father or mother until child ●

attains twenty-one) or for nurture (also father or mother ^{their guar-} until child attains fourteen, where there is no testamentary ^{dians.} guardian, *Roach v. Garvan*, 1 Ves. 158) have only the care of the infant's person, and cannot make any lease of his lands, except, *perhaps*, a lease at will. (*Pigot v. Garnish*, Cro. Eliz. 678.) But guardians appointed by the common law in respect of lands descended to an infant until he attains fourteen (called guardians in socage, Bac. Ab. "Leases," I, 9), guardians appointed by will under 12 Car. 2, c. 24 (called testamentary guardians), guardians by virtue of, or appointed under the provisions of, the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), who by section 4 are invested with the powers conferred by the statute of Charles II. on testamentary guardians and guardians by election (*i.e.*, elected by an infant of fourteen, seised of socage land, and unprovided with a testamentary guardian), have not merely a bare authority over but an actual interest in the infant's estate, and, as *domini pro tempore*, have the power of making leases during the continuance of their guardianship (*Dugar v. Norton*, 1 Freem. 102; *Wade v. Baker*, 1 Ld. Raym. 130; *Rex v. Sutton*, 3 A. & E. 597); but a demise for a longer period than the ward's minority would be voidable by him on his coming of age. (Bac. Ab. "Leases," I, 9.) Guardians appointed by the Court are in the nature of receivers, and must obtain the sanction of the Court to enable them to grant leases. (*Rex v. Sutton*, 3 A. & E. 608; *Re James*, L. R., 5 Eq. 334.)

By statute, infants are empowered to grant renewable ^{By statute.} leases under the direction of the Court, given upon the application of the infant or his guardian, and, subject to the same authority, they may grant building, farming, and other leases without fine, and reserving the best rent. (11 Geo. 4 & 1 Will. 4, c. 65, ss. 16, 17.) The Court may also authorize leases of infants' estates for the terms and subject to the provisions contained in the Settled Estates Act, 1877. (40 & 41 Vict. c. 18, ss. 46, 49; and see 44 & 45 Vict. c. 41, s. 41.) By these sections guardians on behalf of infants may execute all powers given, and make all applications, and give all consents and notifications required, under this Act, but in the case of an infant tenant in tail a special direction of the Court is necessary.

An infant seised or entitled in his own right in possession to land is a "tenant for life" within the Settled Land ^{Under Settled Land Act.}

Act, 1882 (45 & 46 Vict. c. 38), s. 59, and the leasing powers by the Act conferred on a tenant for life (*ante*, p. 31) may be exercised on his behalf by the trustees of the settlement, if any, and otherwise by such person as the Court, on the application of the testamentary or other guardian or next friend of the infant, may order. (Sect. 60.)

(b) Married women.

A married woman may make a valid lease of hereditaments (1) which have become her separate property by virtue of the provisions of the Married Women's Property Acts, 1870 or 1882 (33 & 34 Vict. c. 93; 45 & 46 Vict. c. 75); (2) settled to her separate use without restraint on alienation; or (3) which she is expressly empowered to demise. (Sug. Pow. c. 4, s. 1.) With these exceptions, a lease made by a wife *alone* is absolutely void (*Goodright v. Straphan*, Cowp. 201), unless the wife is living apart from her husband under a decree for judicial separation (20 & 21 Vict. c. 85, s. 25), or under a protection order. (*Ib.* s. 21; 21 & 22 Vict. c. 108, s. 8.) But if her husband concur in the deed, and the wife acknowledge it before a judge of the High Court (3 & 4 Will. 4, c. 74, s. 79), a judge of the County Court (51 & 52 Vict. c. 43, s. 184), or a perpetual commissioner (3 & 4 Will. 4, c. 74, s. 79; 45 & 46 Vict. c. 39, s. 7), she may make a lease for any term consistent with her estate.

By the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), husbands entitled to settled estates in right of their wives, or to unsettled estates as tenants by the curtesy, or in right of a wife who is seised in fee, may, without application to the Court, make leases thereof (except the principal mansion-house and the demesnes thereto attached) for any term not exceeding twenty-one years, to take effect in possession, and subject to provisions contained in that Act. (Sects. 46—48.) Longer leases under the Act of settled estates, in which the wife has only a life interest, for building, repairing, or mining purposes, must be authorized by the Court, unless the settlement contains some express power authorizing such leases.

Leases under Settled Land Act.

The leasing powers by the Settled Land Act, 1882, conferred on tenants for life are extended to married women tenants for life, so that where the wife is entitled for her separate use, or under any statute for her separate property (*Wade v. Wilson*, 54 L. J., Ch. 782; 33 W. R. 610), she without her husband may exercise those powers; when entitled otherwise than as aforesaid, she and her

husband together may exercise the powers, and a restraint on anticipation shall not prevent the exercise of the powers (45 & 46 Vict. c. 38, s. 61), which may be exercised without a deed acknowledged. The section does not include the case of an infant married woman (Hood & Challis on Settled Land Act, 293), or a married woman tenant in fee simple.

Leases of the wife's freeholds, made by husband and wife, or by the husband alone, not in pursuance of these statutes or of an express power, if *by deed*, are good during coverture (*Wiscot's case*, 2 Co. R. 60; *Bateman v. Allen*, Cro. Eliz. 438; Bac. Ab. "Leases," (C. 1); 2 Wms. Saund. 180, n. 9), but voidable by the wife on the husband's death, unless she accepts rent subsequently due or otherwise confirms them. (*Doe v. Weller*, 7 T. R. 478; *Toler v. Slater*, 37 L. J., Q. B. 33; L. R., 3 Q. B. 42.) If *by parol*, such leases absolutely determine upon the husband's decease (*Walsal v. Heath*, Cro. Eliz. 656; *Parry v. Hindle*, 2 Taunt. 181), and of course the term must not exceed three years. (29 Car. 2, c. 3, ss. 1, 2; 8 & 9 Vict. c. 106, s. 3.) If the husband survive his wife, and become tenant by the curtesy (having had issue by her born alive, that might by possibility inherit the estate as her heir), the lease will absolutely determine at his death (*Miller v. Maynwaring*, Cro. Car. 397); if he do not become tenant by the curtesy, the lease becomes void upon the wife's death as against her heir-at-law. (*Howe v. Scarrott*, 28 L. J., Ex. 325; *Hill v. Saunders*, 2 Bing. 112; S. C. (in error), 4 B. & C. 529.) The husband has the sole dominion during his life over his wife's *leaseholds* which are not her separate property (Co. Litt. 46 b, 351 a; *Manby v. Scott*, 2 Sm. L. C. 466, 9th ed.); and he may underlet for a term to commence immediately, or after his death. (*Grute v. Locroft*, Cro. Eliz. 287; *Anon.*, Poph. 4.) Leaseholds held by the wife *in autre droit* as executrix or administratrix may at common law be disposed of by the husband, who has the whole right of administration. (*Thrustout v. Coppin*, 2 W. Bl. 801.) It seems doubtful whether the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 18, has conferred on a married woman the power of disposition of leaseholds so held without the concurrence of her husband.

A lunatic may make a lease binding upon him; but if (c) Lunatics. it be proved that the lessee knew and took advantage of

the lessor's incapacity, the lease will be void. (*Dane v. Kirkwall*, 8 C. & P. 679; *Molton v. Camroux*, 2 Ex. 487; S. C., in error, 4 Ex. 17; *Beavan v. McDonnell*, 23 L. J., Ex. 94, 326; *Elliott v. Ince*, 7 De G., M. & G. 475; *Imperial Loan Co. v. Stone*, [1892] 1 Q. B. 599; 61 L. J., Q. B. 449.) Under the Lunacy Act, 1890 (53 Vict. c. 5), the judge in lunacy may authorize the committee of the estate of a lunatic to grant leases of any property of the lunatic for building, agricultural, or other purposes; to grant leases of minerals forming part of the lunatic's property, whether already worked or not; to surrender any lease and grant a new one; to execute any power of leasing vested in a lunatic having a limited estate only in the property over which the power extends. (Sect. 120.) The power to authorize leases extends to property of which the lunatic is tenant in tail. (Sect. 122.) Before the Act the Court had no jurisdiction to authorize the exercise of statutory or other powers vested in a lunatic not so found by inquiry. Now, however, the Court has jurisdiction not only over lunatics so found, but also over those not so found; the powers in that case to be exercised by some person to be appointed for the purpose. (Sect. 116.)

Under the Settled Estates Act (40 & 41 Vict. c. 18), the Chancery Division of the High Court of Justice may also authorize leases of lunatics' settled estates, upon application of committees on behalf of lunatics, for terms of years, and subject to the provisions and restrictions therein contained. In the case of lunatic tenants in tail the special direction of the Court is required. (*Id.* s. 49.)

Under the Settled Land Act, 1882, where a tenant for life is a lunatic so found, the committee of his estate may, under an order of the Lord Chancellor, or other person entrusted with the care and custody of lunatics, exercise the powers of a tenant for life under that Act. (45 & 46 Vict. c. 38, s. 62.)

(d) Aliens.

Aliens may now acquire and dispose of any property whatsoever as freely as natural-born British subjects. (33 Vict. c. 14, s. 2.)

(e) Persons under duress or intoxicated.

A lease extorted from a person while illegally restrained of his liberty, or in fear of loss of life or limb, is voidable at his election when the duress has ceased. (5 Rep. 119.) A lease made by a person so intoxicated as not to know what he is doing is void. (*Gore v. Gibson*, 13 M. & W. 623.)

Any person who has been convicted of treason or felony, and sentenced to death or penal servitude, is precluded by 33 & 34 Vict. c. 23, s. 8, from leasing any property, unless when he is lawfully at large under any licence (*id.* s. 30), or has suffered his punishment, or received a pardon. (*Id.* s. 7.) During his disability, the administrator of his property, appointed pursuant to section 9, may let any part thereof at his discretion. (*Id.* s. 12.)

(f) Convicts.

SECT. 2.—*Who may be Lessees.*

All persons, except alien enemies (*Calvin's case*, 7 Co. R. 17), may be lessees (4 Cruise's Dig. tit. xxxii. "Deed," c. 5, § 86); but demises to persons under disability may be by them avoided upon removal of the disability. Thus, an infant may accept a lease and avoid it during infancy (*Valentini v. Canali*, 24 Q. B. 166; 59 L. J., Q. B. 74), or on attaining his majority (*Ketsey's case*, Cro. Jac. 320; *Lempriere v. Lange*, 41 L. T. 378; 12 Ch. D. 675; 27 W. R. 879), if he elect to do so within a reasonable time thereafter, otherwise he will be liable to pay rent, including arrears (Bac. Ab. "Leases," (B)), and perform all other obligations of the tenancy, even though it be disadvantageous to him. (*London and North Western Rail. Co. v. M'Michael*, 20 L. J., Ex. 97; 5 Ex. 128.) If he repudiates the lease he is discharged from rent accruing subsequently, but remains liable for rent accrued prior to the repudiation (*Blake v. Concannon* (1870), 4 Ir. Rep., C. L. 323), and he cannot recover a premium paid for the lease. (*Holmes v. Blogg*, 8 Taunt. 35.) During infancy he will be liable to be sued for rent of necessary lodgings (*Hands v. Slaney*, 8 T. R. 578), or a necessary house (*Lempriere v. Lange, supra*), though not for rent of a house taken for trading purposes. (*Lowe v. Griffiths*, 1 Scott, 458.) Where an infant agreed to become tenant of a house and pay a certain sum for the furniture, part of which he paid and occupied the premises for some time, and afterwards repudiated the contract, he was not entitled to recover back the sum paid. (*Valentini v. Canali*, 24 Q. B. D. 166.) Leases to infants may be surrendered and renewed under direction of the Chancery Division of the High Court. (11 Geo. 4 & 1 Will. 4, c. 65, s. 12; 36 & 37 Vict.

Infants.

c. 66, s. 34; *Re Griffiths*, 29 Ch. D. 248; 54 L. J., Ch. 742.) The disability of infants is for their benefit only; thus if an infant's partner obtain the renewal of an advantageous lease to himself *only*, the infant shall share the benefit, though he may repudiate any loss if the lease turn out disadvantageous. (*Ex parte Grace*, 1 B. & B. 376.)

If an infant obtain a lease by the representation that he is of full age, the lease will be set aside at the instance of the lessor, who cannot, however, in that case recover damages for use and occupation. (*Lempriere v. Lange*, *supra*.)

Married
women.

A *feme covert* may likewise take a lease, but at common law it would be voidable by her husband (*Sucaine v. Holman*, Hob. 204; Co. Litt. 3 d), and (unless she had assented to it) by herself or her heirs after his death. (*Ib.*) A married woman living apart from her husband may take a lease and become liable for payment of rent and performance of covenants out of her separate estate. (*Gaston v. Frankum*, 2 De G. & Sm. 561.) And now, under the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), as from the 1st of January, 1883, a married woman may enter into, and render herself liable to the extent of her separate property on, any contract, and every contract entered into by a married woman shall bind her separate property. (Sect. 1, sub-ss. 2, 3.) But in an action against her on a contract to take a lease, the plaintiff must allege and prove that she had separate property at the date of the contract. (*Palliser v. Gurney*, 19 Q. B. D. 519; 56 L. J., Q. B. 546; *Tetley v. Griffith*, 57 L. T. 673; *Stogdon v. Lee*, [1891] 1 Q. B. 661; 64 L. T. 494.) Except under the last-mentioned statute, or when made with reference to and upon the credit of the wife's separate estate (*Fry*, 684), a lease made to husband and wife jointly may be avoided by the wife *after* the death of her husband only; but if she then acquiesce she may become liable on the lease for rent and waste committed during the coverture (2 Inst. 303; Com. Dig. tit. "Baron and Feme," s. 2), though not perhaps on any *special* covenants. (1 Roll. Ab. 349, pl. 2; Brownl. 31; Dyer, 13 b.) Leases to married women may be surrendered and renewed by direction of the Chancery Division of the High Court of Justice. (11 Geo. 4 & 1 Will. 4, c. 65, s. 12; 36 & 37 Vict. c. 66, s. 34.)

Persons non
compos.

Idiots and lunatics may take leases for their benefit (Co. Litt. 2 b); but a lessor may not profit by taking advantage of their incapacity. (*Dane v. Kirkwall*, 8 C. & P. 679; *Browne v. Joddrell*, M. & M. 105.) A lease granted

fairly by the lessor, and accepted and enjoyed by the lunatic, cannot be set aside. (*Molton v. Camroux*, 18 L. J., Ex. 68, 356; *Beavan v. M'Donnell*, 23 L. J., Ex. 94; *Campbell v. Hooper*, 24 L. J., Ch. 644.) The committee of a lunatic may, on his behalf and for his benefit, surrender and renew leases under direction of the Judge in Lunacy, and be admitted tenant of copyholds. (53 Vict. c. 5, ss. 120—122, 125.)

Leases executed by persons under duress, in fear of loss of life or limb, or so totally intoxicated as not to know the nature and quality of the act they are doing, are not binding upon them. Persons under duress or intoxicated.

An alien (not being an alien enemy, *ante*, p. 63) may become a lessee as freely as a natural-born British subject. (33 Vict. c. 14, s. 2.) Aliens.

The administrator of the property of a person who has been convicted of treason or felony, and sentenced to death or penal servitude, may take such leases as may become necessary to the proper management of the convict's property. (33 & 34 Vict. c. 23.) Convicts.

Corporations aggregate may take leases in their corporate capacity (Bac. Ab. "Corporations," (E 4)), which will go in succession, unlike leases to a corporation sole, which at his death (in the absence of contrary custom (Bac. Ab. "Corporations," (E 4))) devolve on his executors. (Co. Litt. 4 b.) By the Mortmain and Charitable Uses Act, 1888, it is enacted that land shall not be assured to or for the benefit or acquired by or on behalf of any corporation, sole or aggregate, in mortmain, otherwise than under the authority of a licence from the Crown or a statute for the time being in force, and if so assured becomes forfeited to the Crown. (51 & 52 Vict. c. 42, ss. 1, 6.) It was considered in *Vigers v. Dean &c. of St. Paul's* (18 L. J., Q. B. 97), that the Mortmain Acts do not apply to an interest not in itself perpetual. There are, however, old authorities deciding that leases to corporations, if for long terms, as 100 years (*Rowles v. Mason*, 2 Brownl. 197), or 81 years (*Hemming v. Brabazon*, Bridg. 7), may bring the land into mortmain and incur forfeiture; but not leases for twenty-one or forty years. (*Jesus Coll. v. Gibbs*, 1 Y. & C. Ex. 145; *Tudor's Charitable Trusts* 382, 3rd ed.) One of its members cannot become lessee to a corporation. (*Salter v. Grosvenor*, 8 Mod. 303.) Corporations.

Trustees for
charitable
uses.

Trustees for charitable uses may take leases of lands in England and Wales. These must, in accordance with the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), be by deed executed in the presence of at least two witnesses (*Wickham v. Marquis of Bath*, 35 L. J., Ch. 5; L. R., 1 Eq. 17; *Bunting v. Sargent*, 13 Ch. D. 330; 49 L. J., Ch. 109), and, unless in good faith for full and valuable consideration, must be made at least twelve months before the death of the lessor, and must within six months after the execution thereof, be enrolled in the Central Office of the Supreme Court of Judicature, and must be without power of revocation, reservation, or condition, other than is specially permitted by the Act (sect. 4), which, however, permits the ordinary reservations, covenants, and proviso for re-entry, in a lease. (See sect. 4, sub-s. 4.) The Act requires the assurances to take effect in possession immediately from the making thereof; but the Act of 26 & 27 Vict. c. 106, which is left unrepealed, provides that they may be made to take effect in possession within one year from the date. (See Tudor's Charitable Trusts, 386, 3rd ed.) A colourable lease, made in evasion of the Mortmain Act, is void as against the heir of the lessor. (*Doe v. Lloyd*, 5 Bing. N. C. 741.) A charter or statute authorizing a corporation or other public body to acquire land, does not, unless expressly so worded, remove the necessity of acquiring it by a deed in conformity with the Mortmain Act. (*Mogg v. Hodges*, 2 Ves. Sen. 52; *Webster v. Southey*, 36 Ch. D. 9; 56 L. J., Ch. 785.)

Trustees of
friendly
societies.

Friendly societies are empowered, if their rules so provide, to take leases, in the names of their trustees, of buildings and land for the use of the society, but limited in the case of a benevolent society to an acre in extent. (38 & 39 Vict. c. 60, s. 16.)

Trustees of
public baths
and wash-
houses.

Municipal corporations and commissioners appointed for the purpose may, with the sanction of the vestry, take leases of baths and washhouses for the public use. (9 & 10 Vict. c. 74, s. 27; 45 & 46 Vict. c. 30, ss. 2, 3.)

Town coun-
cils, &c.
under the
Public
Libraries
Acts.

Under the Public Libraries Act, 1892 (55 & 56 Vict. c. 53), which repeals the previous enactments, the library authority in any district, *i.e.*, the council of any borough and the local board of any district, and, in the case of a parish, "The Commissioners for Public Libraries and Museums" (sect. 4), may purchase and hire land for public libraries, public museums, schools for science, art

galleries, and schools for art (sect. 11). As to the application of the Act to London, see sects. 21—23.

Leases made to trustees of any society for religious purposes, or for the promotion of education, art, literature, and science, of not more than two acres of land, for full rent or value, are exempt from the Mortmain and Charitable Uses Act, 1888. (51 & 52 Vict. c. 42, s. 7; *Gibson v. Wise*, 35 W. R. 409.)

Trustees for religious, educational, literary, and scientific societies.

Spiritual persons performing the duties of any ecclesiastical office may not take leases for occupation of more than eighty acres of farming land without the written permission of their bishop. (1 & 2 Vict. c. 106, s. 28.) If they do, the lease is voidable.

Ecclesiastics.

Churchwardens and overseers may take leases of houses and lands for parish purposes (59 Geo. 3, c. 12, ss. 12, 17); and guardians of the poor, with the approval of the Poor Law Board, may take leases temporarily, or for not more than five years, of lands and buildings for the relief or employment of the poor, and for their own use. (30 & 31 Vict. c. 106, s. 13.)

Parish officers.

CHAPTER III.

WHAT MAY BE DEMISED.

ALMOST every sort of tenements and hereditaments, incorporeal as well as corporeal, advowsons (3 Dyer, 323), annuities (Co. Litt. 144 b), corrodies (Bac. Ab. "Leases" (A)), estovers (*ib.*), ferries (*Rex v. Nicholson*, 12 East, 330; *Peter v. Kendal*, 6 B. & C. 703), fisheries (*Somerset v. Fogwell*, 5 B. & C. 875), franchises (*ib.*), rights of common (*Smey v. Brown*, Latch. 99), rights of herbage (*Tottel v. Houel*, Noy, 54), rights of way (*Newmarch v. Brandling*, 3 Swanst. 99; *Osborn v. Wise*, 7 C. & P. 761), tithes (*Cox v. Brain*, 3 Taunt. 95), tolls (*Oldroyd v. Crampton*, 4 Bing. N. C. 24; *Bridgland v. Shapter*, 5 M. & W. 375; *Harris v. Morrice*, 10 M. & W. 260; *Walker v. Richardson*, 2 M. & W. 882), goods, furniture (Bac. Ab. "Leases" (A)), sheep and other live animals (*Spencer's case*, 5 Co. 16 b), and almost all else, even offices of trust, save those connected with the public revenue and justice, may be let on lease for a term of years. Leases of live stock are among the most ancient known to the law and still exist (*Holme v. Brunskill*, 3 Q. B. D. 495; 47 L. J., C. P. 610), even in the curious form of a combined lease and agistment. (*Tudgway v. Sampson*, 30 L. T., N. S. 262; *Burt v. Moore*, 5 T. R. 329; *R. v. Tolpuddle*, 4 T. R. 671.)

The consideration of the peculiarities of incorporeal hereditaments, goods, and the like, as separate subjects of demise, are in this work, however, only treated incidentally when they present any broad feature of distinction, the main object of the present work being to deal with the letting of corporeal hereditaments—houses and land—and such incorporeal hereditaments—ways, lights, and other easements—as are commonly demised with them.

CHAPTER IV.

THE DEMISE—ITS REQUISITES AND NATURE.

SECT. 1.—*Leases.*

IN treating of leases it is desirable at the outset to distinguish between a lease and a licence. A lease or demise entitles the tenant to the *exclusive* possession, for some definite period, of the matter demised; but if a person is not to have the exclusive possession of, or sole dominion over, the matter, then his limited right to use and enjoyment is a licence, which confers no estate in the property (*Reg. v. Morrish*, 32 L. J., M. C. 245; *Mogg v. Yatton Overseers*, 50 L. J., M. C. 17; 6 Q. B. D. 10; *Coleman v. Foster*, 1 H. & N. 37), though the instrument contain words of demise, and purport to reserve a rent. (*Smith v. St. Michael, Cambridge*, 30 L. J., M. C. 74; 3 E. & E. 383.) Thus, where permission is given to a man to use a building or a field for a given purpose, but the building or field remains under the control of the owner, a licence and not a lease is created. (*Hancock v. Austin*, 14 C. B., N. S. 634; 32 L. J., C. P. 252; *Watkins v. Gravesend*, L. R., 3 Q. B. 350; 37 L. J., M. C. 73.) The following have been held to create licences only:—An agreement to let a hall on four specific days at a given rent, but the agreement showed that the letting was not to include any control over the premises (*Taylor v. Caldwell*, 32 L. J., Q. B. 164; 3 B. & S. 826); an agreement for standing room and motive power for lace machines in consideration of a weekly payment (*Hancock v. Austin*, *supra*); the allotment of a space of ground in a building for the purpose of selling refreshments or other goods while an exhibition is open (*Reg. v. Morrish*, *supra*; *Rendell v. Roman*, 9 Times L. R. 192); the right to erect bookstalls in a station, and the exclusive right of selling certain articles thereat (*Smith v. Lambeth Assessment Committee*, 10 Q. B. D. 327; 52 L. J., M. C. 1); a sale of the right to the eatage of grass on land for ten months, the purchaser to dress, dung, cut thistles,

Leases and
licences dis-
tinguished.

and repair fences, but not to pay rates or taxes (*Mogg v. Yatton Overseers, supra*) ; a grant by deed of the exclusive right of putting and using pleasure boats for hire on a canal (*Hill v. Tupper*, 32 L. J., Ex. 217 ; 2 H. & C. 121) ; an agreement for the exclusive use of one or more rooms, of which the person letting them retains possession by his servants for the purpose of cleaning and rendering other services (*Smith v. St. Michael, Cambridge*, 30 L. J., M. C. 74 ; 3 E. & E. 383) ; an agreement for directors to have the exclusive use of a board room at certain times (*Municipal, &c. Land Co. v. Metropolitan, &c. Joint Committee*, Cab. & El. 184) ; and a grant of liberty to dig for tin and dispose of the tin obtained. (*Doe v. Wood*, 2 B. & Ald. 738.)

But if the terms of the agreement show that the grantor intends to part with an estate in the property, and to confer an exclusive right of occupation, so that the grantor has no right to come upon the premises without the consent of the occupier, a demise is created, though no words of letting are used, and the remuneration is not spoken of as rent. (*Cory v. Bristow*, 2 App. Ca. 262 ; 46 L. J., M. C. 273 ; *Roads v. Trumpington Overseers*, L. R., 6 Q. B. 56 ; 40 L. J., M. C. 35 ; *Taylor v. Pendleton Overseers*, 19 Q. B. D. 288 ; 35 W. R. 762.)

Licensee not liable to distress or rates.

It is of some importance that this distinction should be borne in mind, since the relationship of landlord and tenant not being created by a licence, there is neither the right in the licensor to distrain (*Hancock v. Austin, supra*), nor—except by statute, as under 37 & 38 Vict. c. 54, in the case of sporting (*Kenrick v. Guilsfield Overseers*, 49 L. J., M. C. 27 ; 5 C. P. D. 41), and mining (*Snailbeach Mine v. Forden Guardians*, 35 L. T. 514), and under 52 & 53 Vict. c. 27, in respect of hoardings and places used for advertisements (*Chappell v. Overseers of St. Botolph*, [1892] 1 Q. B. 561)—any liability on the part of the licensee to pay rates as an occupier. (*Reg. v. Morrish, supra* ; *Mogg v. Yatton Overseers, supra* ; *Smith v. Lambeth Assessment Committee*, 10 Q. B. D. 327 ; 52 L. J., M. C. 1.)

A bare licence and a grant of an interest distinguished.

It is necessary also to distinguish between a bare licence and a licence containing or coupled with a grant of an interest, or *profit à prendre*. (*Wickham v. Hawker*, 7 M. & W. 78 ; *Heap v. Hartley*, 42 Ch. D. 461, 468 ; *Duke of Sutherland v. Heathcote*, [1892] 1 Ch. 475.)

A mere licence passes no interest and transfers no pro-

perty in anything, but only makes an act lawful which without it would have been unlawful. A grant confers an interest in something which the person is licensed to take. Thus, a licence to an individual to hunt in a man's park, and carry away to his own use the deer killed, to cut down a tree and carry it away to his own use, are licences as to the acts of hunting and cutting, but as to the carrying away of the deer killed and tree cut they are grants. (*Thomas v. Sorrell*, Vaugh. 351; *Muskett v. Hill*, 5 Bing. N. C. 707; *Wood v. Leadbitter*, 13 M. & W. 844.)

Generally speaking, a mere licence may be given by parol. It is personal and cannot be assigned, and whether by parol or under seal it is revocable by the grantor at any time (*Wood v. Leadbitter*, 13 M. & W. 845); but the licensee is entitled to notice of the revocation, so that, where the licence is to go upon the land of another, the licensee may have reasonable time for quitting the land (*ib.*); and where the licence is to put goods on the land of another, that the licensee may have reasonable time to remove the goods. (*Cornish v. Stubbs*, 39 L. J., C. P. 202; L. R., 5 C. P. 334; *Mellor v. Watkins*, L. R., 9 Q. B. 400; 23 W. R. 55.) But locking a gate was held to be sufficient notice of the revocation of a parol licence to use a way. (*Hyde v. Graham*, 1 H. & C. 593; 11 W. R. 119.) A licence is revoked if the property in respect of which it is granted ceases to be the property of the grantor. (*Wallis v. Harrison*, 4 M. & W. 538; *Coleman v. Foster*, 1 H. & N. 37.) To the above rule as to revocability there is an exception where the licence has been granted for value, and the grantor has allowed the licensee to expend money upon the faith of it, in which case he will not be allowed to revoke it. (*Duke of Devonshire v. Eglin*, 14 Beav. 530; 20 L. J., Ch. 495; *Winter v. Brockwell*, 8 East, 308; but see *Bankart v. Tennant*, L. R., 10 Eq. 141; 39 L. J., Ch. 809.)

The most familiar instances of a licence coupled with a grant of an interest are, the grant of a right to take game (*Wickham v. Hawker*, 7 M. & W. 63; *Hooper v. Clark*, 36 L. J., Q. B. 79; L. R., 2 Q. B. 200), to search for and get minerals (*Muskett v. Hill*, 5 Bing. N. C. 694; *Doe v. Wood*, 2 B. & Ald. 738), and to collect and take water. Where a landlord, with the assent of his tenant, sold the hay of the latter under a distress, subject to a condition

Qualities of a
mere licence.

Qualities of a
licence
coupled with
a grant.

that the purchaser might let the hay remain until a given date, and in the meantime enter on the premises as often as he pleased to remove it, the licence was held irrevocable by the tenant (*Wood v. Manley*, 11 A. & E. 34), a decision approved by Alderson, B. (13 M. & W. 853), on the ground that it was a licence coupled with an interest. Licences coupled with the grant of an interest in the nature of an easement are sometimes referred to as easements. This is an error, since there is no such thing as an easement in gross; there must be a dominant tenement in respect of which it is enjoyed. (*Rangeley v. Midland Rail. Co., L. R.*, 3 Ch. 306; 37 L. J., Ch. 313, *per* Lord Cairns.)

A licence, coupled with a grant of a *profit à prendre*, or of a right in the nature of an easement, must be by deed, since it creates an incorporeal hereditament. (*Wood v. Leadbitter*, 13 M. & W. 842.) An agreement for such a grant is void under the Statute of Frauds unless in writing (*Webber v. Lee*, 9 Q. B. D. 315; 51 L. J., Q. B. 485), except to the extent of a mere countermandable licence. (*Carrington v. Roots*, 2 M. & W. 248.) But an agreement in writing for the grant of an incorporeal right may be specifically enforced, and will support an action for damages for breach thereof. (*Smart v. Jones*, 33 L. J., C. P. 154; 15 C. B., N. S. 717.) Even a verbal agreement for such a grant may be specifically enforced after part performance. (*McManus v. Cooke*, 35 Ch. D. 681; 56 L. J., Ch. 662.) And a licensee of an incorporeal right, who has had the actual enjoyment of the right, cannot set up the invalidity of the instrument for want of a seal as a defence to an action for breach of the provisions of the licence. (*Adams v. Clutterbuck*, 10 Q. B. D. 403; 52 L. J., Q. B. 607.)

A licence coupled with a grant is irrevocable (*Wood v. Leadbitter*, 13 M. & W. 845), and creates an interest capable of being assigned. (*Muskett v. Hill*, 5 Bing. N. C. 694.)

A bare licensee, though he may sue his own grantor for any breach of the personal contract, cannot maintain an action in his own name against a third person for infringement of his rights. (*Hill v. Tupper*, 2 H. & C. 121; 32 L. J., Ex. 217; *Stockport Waterworks Co. v. Potter*, 3 H. & C. 300; *Heap v. Hartley*, 42 Ch. D. 461.) But where the licence is coupled with a grant, the licensee who, in exercise of his authority, has reduced the subject-matter

into his possession, may maintain an action against a wrong-doer who interferes with his possession. (*Northam v. Bouden*, 11 Ex. 70; 24 L. J., Ex. 237.)

Incorporeal rights are said to lie in grant, and not in livery, and at common law no incorporeal right could be created, or as a distinct subject of grant be transferred, otherwise than by deed; and, therefore, a lease of such,—as, for example, of a fishery, or of tithes, or the like,—has necessarily been by deed to be valid. (*Somerset v. Fogwell*, 5 B. & C. 875; *Bird v. Higginson*, 2 A. & E. 696; 6 A. & E. 824; *Gardiner v. Williamson*, 2 B. & Ad. 336. For an enumeration of incorporeal hereditaments, see 2 Bl. Com. Bk. II. c. 3.) Moreover, a corporation can only bind itself by a deed under its common seal, and with that formality only grant or acquire leases. (*Partridge v. Ball*, 1 Ld. Raym. 136; *Hunt v. Wimbledon Local Board*, 4 C. P. D. 48; 48 L. J., Q. B. 207; but see *Ecclesiastical Commissioners v. Merral*, L. R., 4 Ex. 162, ante, p. 44.) With these two exceptions leases for years, of whatever length, were not required by the common law to be in writing.

Common law requirements for leases.

By the Statute of Frauds (29 Car. 2, c. 3), it is enacted, sect. 1, that “all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to or out of any messuages, manors, lands, tenements or hereditaments made or created by livery and seisin only, or by parol, and not put in writing by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the effect of leases or estates at will, any consideration for making any such parol leases or estates notwithstanding.” But by sect. 2, leases not exceeding three years, from the making thereof, whereupon the rent reserved during such term amounts to two-thirds at least of the full improved value, are excepted. By the 8 & 9 Vict. c. 106, s. 3, it is provided that “a lease required by law to be in writing, of any tenements or hereditaments made after the 1st of October, 1845, shall be void unless made by deed.”

Statutory requirements. 29 Car. 2, c. 3.

8 & 9 Vict. c. 106, s. 3.

The effect of these statutes, and the decisions upon them, is as follows:—

When deed requisite.

(1.) Incorporeal hereditaments can only be demised by deed, unless they are appurtenant to corporeal hereditaments, when they will pass under a demise sufficient to pass the latter. Where a demise, not under seal, of cor-

Leases of incorporeal hereditaments.

poreal and incorporeal hereditaments at one entire rent, is void as to the incorporeal hereditaments, no portion of the rent can be distrained for (*Gardiner v. Williamson*, 2 B. & Ad. 336; *Neale v. Mackenzie*, 1 M. & W. 747, 763); but if the tenant enter and occupy the corporeal hereditaments, he will be liable to an action for use and occupation of the latter. (*Tomlinson v. Day*, 2 B. & B. 680; 5 Moore, 558; and see *Rex v. Pickering*, 2 B. & Ad. 267; *Reg. v. Hockworthy*, 7 A. & E. 492.)

Leases of
land, &c. not
exceeding
three years.

(2.) Leases of land, houses, and other corporeal hereditaments, for three years from the making thereof, and not from a future day (*Raúlins v. Turner*, 1 Ld. Raym. 736), or from a future day to a day not more distant than three years from the making (*Ryley v. Hicks*, 1 Stra. 651; *Edge v. Strafford*, 1 Tyr. 294), reserving a rent of not less than two-thirds the full annual value, may be made by a verbal letting or by writing not under seal. If at the time of the arrangement the tenancy may last for less than three years, though it may last for more, it is not within the first section of the Statute of Frauds. (*Ex parte Voisey, Re Knight*, 21 Ch. D. 442; 52 L. J., Ch. 121, *per Brett*, L. J.) And a lease for less than three years does not require to be by deed by reason of its giving the tenant an option to prolong the tenancy for more than three years from the date of making the lease. (*Hand v. Hall*, 25 W. R. 734; 2 Ex. D. 355; 46 L. J., Ex. 603.)

Where the lease is by parol, a memorandum, read over at the time, may be used by a witness to refresh his memory as to the special terms of the lease. (*Bolton v. Tomlin*, 5 A. & E. 856.)

Leases of
land, &c.
exceeding
three years.

(3.) Leases of corporeal hereditaments for more than three years, or reserving less rent than two-thirds of the full improved value, must be by deed, otherwise only a tenancy at will is created. (*Coatsworth v. Johnson*, 55 L. J., Q. B. 220; 54 L. T. 520.) This rule, based on the statutory provisions, has, to a great extent, been practically abrogated by the rules of equity, and the decisions. For, although an invalid lease creates only a tenancy at will, it had been decided, before the passing of the Judicature Acts, that if a tenant entered under such an instrument, and paid rent, he became a tenant from year to year, on such terms of the instrument as were applicable to a yearly tenancy. (*Ante*, p. 8; *Clayton v. Blakey*, 2 Sm. L. C. 118, 9th ed.) In equity he was considered a

tenant according to the tenor of the instrument; and where the instrument contained the essential terms of an agreement, or there had been part performance, the Court would treat the void lease as an agreement capable of specific performance. (*Ante*, p. 8; *Parker v. Taswell*, 27 L. J., Ch. 812.) Since the Judicature Acts, under the equitable rules which prevail in all the Courts, a tenant in possession under an agreement for a lease, or a lease not under seal for a term exceeding three years, which could be specifically enforced, is, as between himself and the landlord, in the same position as if a lease had been granted to him in the terms of the agreement. (*Walsh v. Lonsdale*, 21 Ch. D. 9; 52 L. J., Ch. 2; *Allhusen v. Brooking*, 26 Ch. D. 559; 53 L. J., Ch. 520; *Re Maughan*, 14 Q. B. D. 958; *Lowther v. Heaver*, 41 Ch. D. 248; 58 L. J., Ch. 482; *Strong v. Stringer*, 61 L. T. 470.) But the agreement must be one of which the Court would decree specific performance. (*Coatsworth v. Johnson*, 55 L. J., Q. B. 220; *Suain v. Ayres*, 21 Q. B. D. 289; 57 L. J., Q. B. 428.) It must not be an agreement which, by a rule of law, is invalid, as in the case of an agreement by a corporation not under seal. (*Hunt v. Wimbledon Local Board*, 4 C. P. D. 48; 48 L. J., Q. B. 207.)

To facilitate and shorten leases the statute 8 & 9 Vict. c. 124, was passed, giving a short form which may be adopted if desired. The form is not very satisfactory, and is seldom used.

Short leases
under 8 & 9
Vict. c. 124.

It is necessary that a lease should contain (1) proper parties; (2) words of present demise; (3) a description of the premises to be demised; (4) the commencement and duration of the term; and (5) the rent; and, of course, when the term is for more than three years, execution as a deed. An instrument containing these matters is a lease (*Wright v. Trexerant*, Moo. & M. 231); it is immaterial in what order they are placed, or in what language expressed. A lease not required to be by deed may even be constituted by the letters of the parties. (*Chapman v. Bluck*, 4 Bing. N. C. 187, 194.) When required to be by deed, it may either be by indenture or deed-poll. Though the above-mentioned matters are the essentials of a lease, the agreement of the parties often necessitates the insertion of other matters. It is therefore proposed to consider in detail, not only the before-mentioned matters, but other

Essentials of
lease.

points necessary to be borne in mind in the construction of leases.

Date.

A date is not necessary to a lease. When by deed it takes effect from the date of delivery. So that if there be no date, or an impossible one, as the 30th of February, it takes its date and operation from the day of delivery. (*Styles v. Wardle*, 4 B. & C. 908.) If the date be a sensible one, the delivery will be assumed to have been on that day, in the absence of proof to the contrary, and the word date in other parts of the deed means the day of the date and not of the delivery. (*Ib.*) But either party may give parol evidence that the date is false, and so give the lease operation from the delivery only. (*Steele v. Mart*, 4 B. & C. 272.)

The parties.

The full christian and surnames of the parties, with their residence and profession or trade, are usually inserted; but any description is sufficient which clearly distinguishes a party from all others. (*Shep. Touch.* 233.) It has been held that a party need not be otherwise named than by signing and sealing the deed. (*Nurse v. Frampton*, 1 Ld. Raym. 28.)

Words of demise.

The usual words of demise are "demise" or "lease." But there is no magic in these particular words. Formerly nice questions arose as to whether an instrument was a lease or merely an agreement for a lease, the leaning of the Courts being to construe every instrument which showed an intention that the relation of landlord and tenant should arise as an actual lease. Since the passing of 8 & 9 Vict. c. 106, requiring (sect. 3) leases for more than three years to be by deed, it has been the practice of the Courts to regard instruments which cannot operate as leases, although in terms present demises, as agreements for leases (*Parker v. Taswell*, 27 L. J., Ch. 812; *Tidey v. Mollett*, 16 C. B., N. S. 298; 33 L. J., C. P. 235; *Martin v. Smith*, L. R., 9 Ex. 50; 43 L. J., Ex. 42); which practically become leases when possession is taken by the tenant, and the agreement is one which would be specifically enforced. (See *Walsh v. Lonsdale*, and cases cited *ante*, pp. 8, 74.) Subject to this qualification, any words which are sufficient to explain the intention of the parties, that, the one shall divest himself of possession, and the other come into it for a determinate time, whether such words run in the form of a licence, covenant, or agreement, are of themselves

sufficient, and will, in construction of law, amount to a lease for years as effectually as if the most proper and pertinent words had been used. (Bac. Ab. "Lease" (K).) Thus the words, "A. doth let" (*Harrington v. Wise*, Cro. Eliz. 486); "A. agrees to let and B. to take" (*Doe v. Ries*, 8 Bing. 178; *Poole v. Bentley*, 12 East, 168); "You shall have a lease of," &c. (*Maldon's case*, Cro. Eliz. 33); "A. agrees to pay to B. a certain rent for," &c. (*Wright v. Trezerant*, Moo. & M. 231); or a covenant that another shall have, hold, and enjoy (*Tisdale v. Essex*, Hob. 34; *Drake v. Munday*, Cro. Car. 207), followed by the entry of the tenant, would amount to a lease. (*Staniforth v. Fox*, 7 Bing. 590; *Doe v. Ashburner*, 2 T. R. 168; *Hancock v. Caffyn*, 8 Bing. 358; 1 Platt on Leases, 579—611.)

In determining whether an instrument is a lease or merely an agreement for a lease, the Courts endeavour to give effect to the apparent intention of the parties (*Morgan v. Bissell*, 3 Taunt. 65); and while, on the one hand, the most informal words, showing that the parties have finally determined that one person is to give and the other to take possession, and the terms of his possession, will operate as a demise (*Bicknell v. Hood*, 5 M. & W. 104, *per Parke*, B.); yet, on the other hand, if the most proper words are made use of whereby to describe and create a present lease for years, and upon the whole instrument there appears no such intent, but that they are only preparatory and relative to a future lease to be made, the law will rather do violence to the words than break through the intent of the parties. (Bac. Ab. "Leases" (K).) However, a mere agreement for or reference to a lease to be drawn up at some future time will not, in itself, reduce an instrument containing words of demise and the terms of the tenancy to an agreement. (*Doe v. Groves*, 15 East, 244; *Barter v. Browne*, 2 W. Bl. 973; *Warman v. Faithfull*, 5 B. & Ad. 1042; *Chapman v. Bluck*, 4 Bing. N. C. 187.) But an express stipulation that the instrument shall not operate as a lease will override words of demise (*Perring v. Brook*, 1 M. & Rob. 510); as will any clause which shows the parties do not intend to be placed in the position of landlord and tenant until something further has been done, *e.g.*, a clause that a third person shall ascertain the manner of working the products of a mine agreed to be let (*Jones v. Reynolds*, 1 Q. B. 506; 10 L. J., Q. B. 193), or that the tenancy shall commence on per-

Instrument
operates as
lease or
agreement
according to
the intent.

formance of a condition. (*Doe v. Clark*, 7 Q. B. 211; 14 L. J., Q. B. 233.) For the reason above stated, however, questions of this description seldom occur now in practice.

The parcels.

The lease should describe with reasonable certainty the property demised, in order to avoid dispute afterwards. A demise of property is *prima facie* to be taken as including that, and that only, which answers the description at the date of the lease. (*Kerslake v. White*, 2 Stark. 508; *Doe v. Burt*, 1 T. R. 701; *Kooystra v. Lucas*, 5 B. & Ald. 830; *Crisp v. Price*, 5 Taunt. 548.) But it would include any portion of the property severed for a mere temporary purpose, as the doors or locks of a house; it would include also, without specific mention, all rights and privileges necessary for its enjoyment and all fixtures attached to it.

Any general description is sufficient which clearly ascertains what was intended to pass by the lease, *e. g.*, "the farm called A.;" "the house being No. 185, Fleet Street;" "the cottage at B., now in the occupation of C.," or the like. A "house in the occupation of A." would pass a cellar so occupied, but under adjoining property (*Press v. Parker*, 2 Bing. 456); and "a house as now or lately occupied by B.," was held to include a stucco facia part of another house, but usually enjoyed with the demised house, and on which its number was painted. (*Francis v. Hayward*, 22 Ch. D. 177; 48 L. T. 297.) Parcel or no parcel is a question of fact, and it may be shown by parol evidence what was and what was not included in a description; such evidence being always admissible to prove all the circumstances necessary to place the Court which has to construe an instrument in the position of the parties to it, thus enabling it to judge of the meaning of the instrument. (*Goodtitle v. Southern*, 1 M. & S. 299; *Baird v. Fortune*, 4 Macq. 127; 10 W. R. 2; *Magee v. Lavell*, L. R., 9 C. P. 107; 43 L. J., C. P. 131.) But however general a description may be, if all its terms fit some particular property, it must not be construed to take in anything but that property. (*Webber v. Stanley*, 33 L. J., C. P. 217; *Hardwick v. Hardwick*, L. R., 16 Eq. 168; 42 L. J., Ch. 636; *Re Bright-Smith*, 31 Ch. D. 314; 55 L. J., Ch. 365.) Therefore a lease of "all mills, &c. in the parish of A.," will not pass a mill at B., though both be under the same roof (*Hall v. Combes*, Cro. Eliz. 368; *Pedley v. Dodds*, L. R., 2 Eq. 819; 14 W. R. 884); and a lease of a messuage and two-yard land in B. in the

possession of G. was held to pass only such of the two-yard land as was in the possession of G., although part not in his possession had from time out of mind been parcel of the two-yard land. (*Bartlett v. Wright*, Cro. Eliz. 299; *Dyne v. Nutley*, 14 C. B. 122; *Magee v. Larell*, *supra*; *O'Connor v. O'Connor*, 19 W. R. 90; and see *Webber v. Stanley*, 33 L. J., C. P. 217; 16 C. B., N. S. 698.) But if property be described as lying in A. and B., it is not necessary it should lie in both; it is sufficient if it lie in either. As to property described as "at or within" a certain place, "at" may be construed "near." (*Homer v. Homer*, 8 Ch. D. 758; 47 L. J., Ch. 635.) Where there was in a lease a precise description by metes and bounds, and a plan of a house and premises, but a stable occupied with the house for many years previously was not included in the metes and bounds or shown on the plan, it was held not to pass under the general words of "all stables to the said premises hereby demised, belonging or appertaining." (*Maitland v. Mackinnon*, 32 L. J., Ex. 49.) Although it may be that something not within the boundary set out would pass if necessarily a part of the premises, as, for instance, a front area, yet the stable could not pass on that principle, because, undoubtedly, it was not *necessarily* a part of the dwelling-house and land as described. (*Ib.*, *per* Pollock, C. B.) The words "Leasehold premises, No. 32, Prince's Gate," were held, however, to pass a stable some distance from the house but usually occupied with it. (*Mocatta v. Mocatta*, 49 L. T. 629; 32 W. R. 477.)

Incorporeal hereditaments in gross cannot be said to have any locality, and would not pass under a grant of all the grantor's hereditaments "situate at" a particular place. (*Kensley v. Langham*, Ca. temp. Talbot, 144; *Rainsford v. Langham*, West's Ca. 510; *Crompton v. Jarratt*, 30 Ch. D. 298; 54 L. J., Ch. 1109; 53 L. T. 603.)

Where several means of identifying the property are used, and all the terms of description do not fit with accuracy any particular property, it becomes a question to what extent words of particular explanation may qualify words of general description. "The rule," observes Parke, J., in *Doe v. Galloway* (5 B. & Ad. 51), "is clearly settled that, when there is a sufficient description set forth of premises by giving the particular name of a close or otherwise, we may reject a false demonstration; but that, if premises be described in general terms and a particular description be

added, the latter controls the former." It matters not, however, which description is placed first, and which last, in the sentence (Taylor, Ev. s. 1104); for the whole facts must be considered to see which was the leading and which the subordinate description. (*Hardwick v. Hardwick*, L. R., 16 Eq. 168.) Thus in a demise of the meadow called B., described as containing ten acres, but in truth containing twenty acres, the whole twenty acres will be included. (Shep. Touch. 248.) So, in a lease of "all that part of the park called B., situate and being in the county of O., lying within certain specified abuttals, with all houses, &c. thereto belonging, and now in the occupation of S.," the reference to the occupancy of S. was rejected in favour of a house answering the rest of the description. (*Doe v. Galloway*, *supra*.) In like manner in a lease of "the Trogues farm, now in the occupation of C.," the reference to the occupation of C. was rejected. (*Goodtitle v. Southern*, 1 M. & S. 299; *Morrell v. Fisher*, 19 L. J., Ex. 273; 4 Ex. 591; *Griffiths v. Penson*, 11 W. R. 313; and see *Hardwick v. Hardwick*, 42 L. J., Ch. 636; *Whitfield v. Langdale*, 45 L. J., Ch. 177; 1 Ch. D. 61; *Travers v. Blundell*, 36 L. T. 341; 6 Ch. D. 436; *Re Bright-Smith*, 55 L. J., Ch. 365; 31 Ch. D. 314.) So it is said, if a landlord having but one house in a street, were to describe it in the lease by a wrong number, and then let a tenant into possession under it, the number would be rejected as an immaterial part of the description. (*Hutchins v. Scott*, 2 M. & W. 816, *per* Lord Abinger, C. B.)

When a plan is used it should be perfectly correct; for unless its effect be restrained by express provision in the deed, it will probably control any description contained in the body of the lease. (*Llewellyn v. Earl of Jersey*, 11 M. & W. 183; *Barton v. Daves*, 10 C. B. 261; 19 L. J., C. P. 302; *Lyle v. Richards*, 35 L. J., Q. B. 214; *Davis v. Shepherd*, L. R., 1 Ch. 410; 35 L. J., Ch. 581; *Manning v. Fitzgerald*, 29 L. J., Ex. 24; *Ware v. London, Brighton, &c. Rail. Co.*, 49 L. T. 541; *Willis v. Watney*, 51 L. J., Ch. 181; 45 L. T. 739.)

When the property is described, and professedly demised, by an admeasurement, followed by the words "more or less" (*Day v. Fynn*, Owen, 133; *Neale v. Parkin*, 1 Esp. 229), or "thereabouts" (*Davis v. Shepherd*, *supra*), or similar terms, the qualifying words must be taken to provide only for a *reasonable* difference in quantity from

that stated. And if let at a specified rental per acre, the admeasurement would, it seems, have to include all comprised in the lease, not excepting the half of a public highway, brook, or drain forming the boundary of the property. (See *Re Popple and Barratt's Contract*, 25 W. R. 248; *Leigh v. Jack*, 49 L. J., Ex. 220; 5 Ex. D. 264.)

Where the land adjoins a highway or non-navigable river, a moiety of the soil of the highway or of the bed of the river will pass even when the land is set forth by admeasurement, and is described by reference to a plan which contains no portion of the road or river. (*Micklethwait v. Newlay Bridge Co.*, 33 Ch. D. 133; 55 L. T. 336.)

There are some words of description which signify more than at first sight they seem to import. Thus "farm" includes the farm-house and all the land used therewith (Co. Litt. 5 a); "messuage" includes a dwelling-house, with orchard, garden, and curtilage, or land attached (*Smith v. Martin*, 2 Saund. 400); "house" has a like significance (*Ib.*; *Cole v. West London and Crystal Palace Rail. Co.*, 28 L. J., Ch. 767; *Barnes v. Southsea Rail. Co.*, 27 Ch. D. 536; 51 L. T. 762; *Wright v. Wallasey Local Board*, 56 L. J., Q. B. 259); and "mill" includes everything belonging to the mill. (*Thorpe v. Milligan*, 5 W. R. 336.) "Land" includes not only the land, but houses and everything growing on or attached to the land. (Co. Litt. 4 a.) "Water" does not extend to land under it, though "pool" does. (Ad. Eject. 19.) The proper description of a piece of water is "land covered with water." (*Challenor v. Thomas*, Yelv. 143; 2 Bl. Com. 18.)

A demise of the "issues and profits" of land is the same as the demise of the land itself. (*Parker v. Plummer*, Cro. Eliz. 190.) A grant of the pasture of land will be taken as a grant not only of the feeding on the land, but the land itself (but see *Mogg v. Yatton Overseers*, 50 L. J., M. C. 17; 29 W. R. 74); and so the grant of a wood will pass the soil as well as the timber. (Co. Litt. 4 b.)

In informal leases a vague description is often attempted to be eked out by such words as "with all appertaining thereto," or "thereunto belonging;" and inasmuch as the parcels to be included depend upon the intention of the parties, these words will generally be construed as "usually occupied with," or "lying to." (*Hill v. Graunge*, Plowd. 170; *Ongley v. Chambers*, 1 Bing. 496; *Thomas v. Owen*, 57 L. J., Q. B. 198; 20 Q. B. D. 225.) But where there

was an agreement for a lease of a furnished house "and premises, with gardens, pleasure grounds, coach-house, and stabling thereto belonging," it was held that a meadow adjoining the said premises did not pass, and that evidence to show that it was the intention of the parties that the meadow should pass was not admissible. (*Minton v. Geiger*, 28 L. T., N. S. 449.)

Easements

which pass
under general
words ;

in case of
lands ;

in case of
buildings.

It has long been the practice to supplement the description of the parcels by "general words" for the purpose of passing such rights in the nature of easements, as have usually been enjoyed with the parcels, but are not legally appurtenant. In a lease granted on or since 1st January, 1882, if no contrary intention is expressed, general words are implied by virtue of the Conveyancing Act, 1881. (44 & 45 Vict. c. 41.) By sect. 2 (v.) of that Act "conveyance" includes lease ; and by sect. 6 a lease includes, in the case of land, "all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land or any part thereof," and in the case of land having houses or other buildings thereon, "all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof."

In *Willis v. Watney* (51 L. J., Ch. 181 ; 30 W. R. 424), Fry, J., rejected the argument that general words only passed rights in the nature of easements, and, construing them like any other words, held that the word "yards" would pass the soil in part of a stable yard. They only include, however, rights of the class usually enjoyed by an occupier, and would not pass an allotment of common land made in respect of commonable rights formerly enjoyed in respect of the property, but extinguished before the date of the lease. (*Williams v. Phillips*, 8 Q. B. D. 437 ; 51 L. J., Q. B. 103.)

It is said that “appurtenances” has a very comprehensive signification (2 Platt on Leases, 33); but it seems very doubtful whether, under that term, taking the word in its strict legal meaning, anything will pass that would not pass without it by operation of law, as part of the property demised. (*Watts v. Kelson*, L. R., 6 Ch. 174; 40 L. J., Ch. 126; *Polden v. Bastard*, L. R., 1 Q. B. 156; 35 L. J., Q. B. 92; *Worthington v. Gimson*, 29 L. J., Q. B. 116; *Cuthbert v. Robinson*, 51 L. J., Ch. 238; 30 W. R. 366.) It is not an apt word for the creation of a new right and will not, strictly speaking, pass a way of necessity over the grantor’s own land, which cannot be legally appurtenant. (*Bolton v. Bolton*, 48 L. J., Ch. 467; 11 Ch. D. 968; *Barlow v. Rhodes*, 2 L. J., Ex. 91; but see *Pinnington v. Galland*, 9 Ex. 1; 22 L. J. Ex. 348.) But the word has a secondary meaning equivalent to “usually occupied with,” and will be so construed where from the circumstances of the case, it was obviously so intended by the parties. (*Thomas v. Owen*, 20 Q. B. D. 225; 57 L. J. Q. B. 198.)

Under the word “appurtenances.”

The most comprehensive of the general words are those referring to rights, &c. “occupied or enjoyed” with the principal subject of demise. But these words do not, as a matter of law, create an easement. (*Thomson v. Waterlow*, L. R., 6 Eq. 36; 37 L. J., Ch. 495; *Brown v. Alabaster*, 37 Ch. D. 490; 57 L. J. Ch. 255.) To give effect to the presumed intention of the parties they will generally be treated as passing all rights in the nature of easements which are, as a matter of fact, enjoyed with the property, though not strictly easements. (*Kay v. Oxley*, L. R., 10 Q. B. 360; 44 L. J., Q. B. 210; *Barkshire v. Grubb*, 50 L. J., Ch. 731; 18 Ch. D. 616; *Bayley v. Great Western Rail. Co.*, 26 Ch. D. 434; 51 L. T. 337.)

Under the words “occupied or enjoyed.”

To this rule there are, however, the following exceptions:—(1) Rights which have no defined existence, as in the case of a track through a yard, but not by a defined path. (*Langley v. Hammond*, L. R., 3 Ex. 161; 37 L. J., Ex. 118.) (2) Alleged rights used for the convenience of the person who held both tenements, but which convenience ceased to exist when a severance took place. (*Thomson v. Waterlow*, *supra*, as explained in *Kay v. Oxley*, *supra*, per Blackburn, J.) And (3) alleged rights which, although within the ordinary meaning of the terms used, cannot, from surrounding circumstances, be presumed to have been intended. (*Roe v. Siddons*, 22 Q. B. D. 224;

60 L. T. 345.) Thus, the words “now or *heretofore* held or enjoyed” were held not to pass the right to use a private road which had formerly existed, but was blocked up at the date of the grant, and which could only, therefore, be enjoyed by altering the physical condition of the property. (*Ib.*)

By estoppel.

Where property is demised by reference to a plan, on which roads or intended new roads over other land of the lessor and communicating with the demised property are shown, there is an implied grant of a right of way over the site of the proposed roads (*Espley v. Wilkes*, L. R., 7 Ex. 298; 41 L. J., Ex. 241; *Furness Rail. Co. v. Cumberland Co-operative Society*, 52 L. T. 144 (H. L.)); and the lessor is estopped from denying that the land described as a road is such. (*Roberts v. Karr*, 1 Taunt. 495; *Harding v. Wilson*, 2 B. & C. 96; and see *Cook v. Ingram*, 94 L. T. Jour. 581.)

Implied grant of easements of necessity;

Where the demise contains no apt words to describe anything beyond the premises, and the lessor is the owner of property adjoining that demised, questions sometimes arise as to what easements over the property retained pass by implication of law under the demise.

If the property is so situated that it would be unusable unless the tenant were allowed to make some use of the adjoining land an easement of necessity arises. The most common instance is a way of necessity. Thus the lessee of a landlocked tenement has, of necessity, a right of way suitable to the business for which the lease was granted (*Corporation of London v. Riggs*, 13 Ch. D. 798; 49 L. J., Ch. 297; *Serff v. Acton Local Board*, 31 Ch. D. 679; 55 L. J., Ch. 569) over other property which belongs to the same landlord. (*Gayford v. Moffatt*, L. R., 4 Ch. 133; *Espley v. Wilkes*, L. R., 7 Ex. 298; 41 L. J., Ex. 241, *per* Kelly, C. B.; *Brown v. Alabaster*, 37 Ch. D. 490; 57 L. J., Ch. 255, *per* Kay, J.) If there be two ways equally convenient, the right of election is in the landlord. (*Bolton v. Bolton*, 48 L. J., Ch. 467; 11 Ch. D. 968; *Brown v. Alabaster*, *supra*.) Having once defined the road the landlord cannot alter it. (*Deacon v. South Eastern Rail. Co.*, 61 L. T. 377.)

of apparent and continuous easements.

It is a maxim of law that a grantor may not derogate from his own grant; in other words, he may not do that which will destroy or render less effectual that which he has granted. The authorities upon the application of this maxim have resulted in what have been called two general

rules, the first of which is, that, on the grant by the owner of a tenement, of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (or rather *quasi* easements), which are necessary to the reasonable enjoyment of the property granted, and which have been, and are at the time of the grant, used by the owner of the entirety for the benefit of the part granted (*Wheeldon v. Burrows*, 12 Ch. D. 31; 48 L. J., Ch. 853; *Russell v. Watts*, 10 App. Cas. 590; 55 L. J., Ch. 158; *Watts v. Kelson*, L. R., 6 Ch. 174; *Ford v. Metropolitan Rail. Co.*, 17 Q. B. D. 12; 55 L. J., Q. B. 296), but restricted in duration to the period for which the grantor had power to grant at the date of the instrument. (*Booth v. Alcock*, 42 L. J., Ch. 557; L. R., 8 Ch. 663.)

The following are instances of continuous *quasi* easements:—the use of an artificial watercourse (*Watts v. Kelson*, L. R., 6 Ch. 166; 40 L. J., Ch. 126); of a drain (*Pyer v. Carter*, 1 H. & N. 916; 26 L. J., Ex. 258; *Hall v. Lund*, 1 H. & C. 676; 32 L. J., Ex. 113); of a coal shoot and waterpipes (*Hinchliffe v. Kinnoul*, 5 Bing., N. C. 1); of window lights and the like. It has been said that a right of way is not a continuous easement within the principle of these cases; but whether it is or not, when there is a formed road over the alleged servient tenement for the apparent use of the dominant tenement, it stands on the footing of continuous and apparent easements. (*Brown v. Alabaster*, 37 Ch. D. 490; *Thomas v. Owen*, 20 Q. B. D. 225; 57 L. J., Q. B. 198.)

On the other hand there is no implied reservation of easements, and if the grantor intend to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. (*Wheeldon v. Burrows*, *supra*.) From the application of these two rules it follows that, in the absence of any express provision upon the point, if a man, possessed of a piece of land and a house adjoining, sell the house, or enter into a binding contract to sell it, so that the purchaser becomes equitable owner (*Beddington v. Atlee*, 35 Ch. D. 317; 56 L. J., Ch. 655), retaining the land, he may not by any new or altered erections obstruct the lights of the house sold as they existed at the time of sale. (*Sicansborough v. Coventry*, 9 Bing. 305; *Robinson v. Grave*, 21 W. R. 569; *Myers v. Catterson*, 43 Ch. D. 470; 59 L. J., Ch. 315.) If, on the other hand, he sell

No implied reservation.

Effect of implication in case of lights.

the land, retaining the house, the purchaser may put up what erections he please, although by so doing he stop up the ancient lights of the vendor. (*Ellis v. Manchester Carriage Co.*, 2 C. P. D. 13; 25 W. R. 229; *Curriers Co. v. Corbett*, 2 Dr. & Sm. 360; *Wheeldon v. Burrows*, *supra*.) But neither of these rules can be invoked in defence of an act contrary to the good faith of a particular contract. (*Russell v. Watts*, 10 App. Cas. 590; 55 L. J., Ch. 158; 53 L. T. 876; 34 W. R. 277.) Therefore, if a number of persons interested in several pieces of land, agree to build upon them in a particular manner so as to accommodate one another, one of them cannot afterwards build so as to obstruct his neighbour's light. (*Ib.*) In any case a subsequent purchaser from, or other person claiming under, the vendor, is in the same position as the vendor. A lease is a sale *pro tanto* (*Shepherd v. Beetham*, 46 L. J., Ch. 763; 25 W. R. 764), and therefore the same principles apply upon the letting as upon the sale of two adjoining premises, the lessee prior in date having the same rights as a purchaser prior in date. Thus a lessor having granted a lease to A., neither he nor his subsequent lessee of adjoining premises may by alteration obstruct the lights existing at the time of demise. (*Reviere v. Boicer*, Ry. & M. 24; *Coutts v. Gorham*, Moo. & M. 396.) On the other hand, the first lessee will be entitled to make alterations in his premises notwithstanding that by so doing he may interfere with the lights of adjoining premises, subsequently let to another tenant. (*Warner v. McBryde*, 36 L. T. 360; and see *Master v. Hansard*, 46 L. J., Ch. 505; 4 Ch. D. 718.)

The same rules that apply to lights apply to other easements, such as the right to adjacent and subjacent support. (*Rigby v. Bennett*, 21 Ch. D. 559; 31 W. R. 222; *Mundy v. Duke of Rutland*, 23 Ch. D. 81; 31 W. R. 510.)

To the rule that there is no implied reservation of easements there are the following exceptions—

(1) In the case of mutual easements, as where the owner of two houses which mutually support each other, grants one, there is an implied grant and reservation of a similar easement of support. (*Russell v. Watts*, 25 Ch. D. 559, 573; 32 W. R. 621, *per* Cotton, L. J.; *Shubbrook v. Tuffnell*, 46 L. T. 886.)

(2) In the case of continuous easements of necessity existing at the time of the grant, such as a way of necessity. (*Ib.*)

Exception to rule against implied reservations.

(3) When the conveyances or leases of adjoining portions of a sub-divided property are cotemporaneous, each portion takes the benefit and burden of *quasi* easements existing at the time of severance (*Allen v. Taylor*, 50 L. J., Ch. 179; 16 Ch. D. 355; *Barnes v. Loach*, 14 Q. B. D. 494; 48 L. J., Q. B. 756; *Phillips v. Low*, [1892] 1 Ch. 47), but only of such as then have a complete existence. (*Watson v. Troughton*, 48 L. T. 569; but see *Compton v. Richards*, 1 Price, 27.) To be cotemporaneous it is not necessary that the assurances should be executed at the same time; but two sales cannot be considered cotemporaneous where there is an interval of thirteen months, though they are parts of one general building scheme. (*Rigby v. Bennett*, 21 Ch. D. 559; 31 W. R. 222.)

Rule in case of cotemporaneous transactions.

(4) Where the original lessee of a part of adjoining premises knows of the intention of the lessor to use the other part of the premises for a particular purpose, which involves an implied reservation of easements, the lessee cannot assert any implied obligation on the part of the lessor to refrain from using the lands retained in the mode contemplated, though it interfere with the full enjoyment of the land leased. (*Birmingham, &c. Banking Co. v. Ross*, 38 Ch. D. 295; 57 L. J., Ch. 601; *Bailey v. Icke*, 64 L. T. 789; *Corbett v. Jonas*, 67 L. T. 191.)

Except in the case of light, a tenant cannot, as against his landlord, acquire an easement by prescription in or over land belonging to his landlord; so that a tenant of one close does not by user acquire an easement over another close belonging to the same landlord. (*Gayford v. Moffatt*, L. R., 4 Ch. 133; *Outram v. Maude*, 17 Ch. D. 391; 50 L. J., Ch. 783; *Bayley v. Great Western Rail. Co.*, 51 L. T. 339; 26 Ch. D. 434.) Nor, in the case of two lessees holding under the same landlord, can the one acquire an easement by prescription as against the other; though in the case of *Daniel v. Anderson* (31 L. J., Ch. 610; 10 W. R. 366) the contrary was suggested.

No rights acquired by prescription in land of landlord.

The easement of unobstructed light, however, stands upon a different footing to other easements. The 3rd section of the Prescription Act (2 & 3 Will. 4, c. 71) provides that when the access and use of light to and for any building shall have been actually enjoyed for twenty years without interruption "the right thereto shall be deemed absolute and indefeasible." Under this section a lessee by twenty

Except access of light.

which uninterrupted enjoyment, acquires a right to the ~~land~~ ~~not only~~ as against a tenant under the same land-
~~lord~~ ~~but also~~ as against the landlord himself. (*Frewen v.*
Pratt, 11 C. B., N. S. 449; 30 L. J., C. P. 356;
Harrell v. Carter, 37 Ch. D. 56; 57 L. J., Ch. 72;
Harvey v. In Pinn, 56 L. J., Ch. 344; *Robson v. Edcardes*,
 42 L. J. 143.)

Exception
and reservation
land.

A demise is often made subject to certain express ex-
 ceptions and reservations in favour of the landlord. An
 exception is a restriction by which the landlord retains to
 himself a part of the parcels which would otherwise pass
 to the tenant under the general terms of the description;
 a reservation is a creation in the landlord's favour of some-
 thing not part of the parcels, but issuing out of them, as a
 rent or services.

The most important essentials of an exception are that
 it should be in favour of the landlord, and not of a
 stranger; that it should be part only of the property, and
 not the greater part, and that it should be of a particular
 thing out of property comprised in general words or under
 a general denomination, and must not be of any of the
 matters which have in express terms been demised. There-
 fore, in a demise of a house and shops, excepting the shops;
 or of certain tenements, excepting a moiety; or of twenty
 acres of land, excepting ten acres; in each case the excep-
 tion is bad. (Shep. Touch. 79; *Cooper v. Emart*, 1
 App. Ca. 286.) And though parcels are granted in
 terms, an exception which tends to frustrate
 not be maintained. (2 Platt on Leases,
 exception operates immediately, and the surplusage
 not pass to the grantee. (*Cooper v. Stuart*.)

The most usual exceptions are of woods,
 mines and minerals.

The rule of construction as to what
 exception is the same as in the case of a
 and, therefore, an exception of "all
 soil intervening between the trees (*Leigh v.*
 521; *Whistler v. Paslow*, Cro. Jac. 1
 225); so of "all underwoods" (*Leigh v.*
 622); but by an exception of "timber"
 the soil they occupy will be included.
supra; Co. Litt. 4 b.) "Wood and
 include fruit trees (*Wyndham v. W.*

years' uninterrupted enjoyment, acquires a right to the light, not only as against a tenant under the same landlord, but also as against the landlord himself. (*Frewen v. Phillips*, 11 C. B., N. S. 449; 30 L. J., C. P. 356; *Mitchell v. Cantrill*, 37 Ch. D. 56; 57 L. J., Ch. 72; *Harris v. De Pinna*, 56 L. J., Ch. 344; *Robson v. Edwardes*, 68 L. T. 195.)

*Exceptions
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tions.*

A demise is often made subject to certain express exceptions and reservations in favour of the landlord. An exception is a restriction by which the landlord retains to himself a part of the parcels which would otherwise pass to the tenant under the general terms of the description; a reservation is a creation in the landlord's favour of something not part of the parcels, but issuing out of them, as a rent or services.

The most important essentials of an exception are that it should be in favour of the landlord, and not of a stranger; that it should be part only of the property, and not the greater part, and that it should be of a particular thing out of property comprised in general words or under a general denomination, and must not be of any of the matters which have in express terms been demised. Therefore, in a demise of a house and shops, excepting the shops; or of certain tenements, excepting a moiety; or of twenty acres of land, excepting ten acres; in each case the exception is bad. (*Shep. Touch.* 79; *Cooper v. Stuart*, 14 App. Ca. 286.) And though parcels are granted in general terms, an exception which tends to frustrate the grant cannot be maintained. (2 *Platt on Leases*, 37.) A valid exception operates immediately, and the subject of it does not pass to the grantee. (*Cooper v. Stuart*, *supra*.)

The most usual exceptions are of woods, timber trees, mines and minerals.

The rule of construction as to what is included in an exception is the same as in the case of the thing demised; and, therefore, an exception of "all woods" includes the soil intervening between the trees (*Ive v. Sams*, Cro. Eliz. 521; *Whistler v. Paslow*, Cro. Jac. 487; 5 Dav. Conv. 225); so of "all underwoods" (*Legh v. Heald*, 1 B. & Ad. 622); but by an exception of "timber trees," nothing but the soil they occupy will be included. (*Whistler v. Paslow*, *supra*; Co. Litt. 4 b.) "Wood and underwood" does not include fruit trees (*Wyndham v. Way*, 4 Taunt. 316); and

“timber trees and other trees, but not the annual fruit thereof,” does not include apple trees. (*Bullen v. Denning*, 5 B. & C. 842.)

An exception of “mines and minerals” includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there be something in the context or the nature of the transaction to induce the Court to give it a more limited meaning. (*Hext v. Gill*, L. R., 7 Ch. 699; 41 L. J., Ch. 761; *Tucker v. Linger*, 21 Ch. D. 18; 8 App. Cas. 308; 51 L. J., Ch. 713; 52 L. J. Ch. 941; *Earl of Jersey v. Guardians of Neath Union*, 22 Q. B. D. 555; *Midland Rail. Co. v. Robinson*, 15 App. Ca. 19; 59 L. J. Ch. 442), that is, everything except the mere surface which is used for agricultural purposes (*Midland Rail. Co. v. Checkley*, L. R., 4 Eq. 19; *Midland Rail. Co. v. Haunchwood Brick, &c. Co.*, 20 Ch. D. 556; 51 L. J. Ch. 778), but subject to the obligation to leave support to the surface in working the minerals. (*Davis v. Treharne*, 6 App. Cas. 460; 29 W. R. 869; *Love v. Bell*, 9 App. Cas. 286; 53 L. J., Q. B. 257; *Mundy v. Duke of Rutland*, 23 Ch. D. 81; *Robinson v. Milne*, 53 L. J., Ch. 1070.)

When anything is excepted, all things depending on it and necessary for the obtaining it are excepted also; as, for example, the right to go on the land to cut the trees excepted, or to sink shafts to get the minerals. (*Shep. Touch.* 100; *Cardigan v. Armitage*, 2 B. & C. 207; *Proud v. Bates*, 34 L. J. Ch. 406.)

Exceptions, so called, but not satisfying the strict requirements of an exception, are sometimes supported upon the equitable ground of giving effect to the intention of the parties. Thus, where there was an agreement to let a farm, except thirty-seven acres, not specifying which, and the tenant took possession, but before the lease was granted disputes arose respecting the land to be excepted, it was held a good exception, and that as the lease had not been executed, the landlord had the right to select, but that if it had been executed, the tenant would have had the right to select the land to be excepted. (*Jenkins v. Green*, 27 Beav. 437; 28 L. J., Ch. 817; but see *Pearce v. Watts*, 23 W. R. 771.)

The terms “reservation” and “exception” are often used in respect of that which is neither. This frequently occurs in respect of rights of way and other easements, and

rights of shooting, fishing, and other privileges. When the landlord purports to "except" or "reserve" to himself an easement, it is in fact a re-grant from the tenant of such easement. (*Durham Rail. Co. v. Walker*, 2 Q. B. 940; 11 L. J., Ex. 442.) And so the "reservation" to the landlord of the right of sporting, hunting, fowling, or fishing is a re-grant by the tenant of a privilege in the nature of a profit *à prendre*. (*Wickham v. Hawker*, 7 M. & W. 63; *Doe v. Lock*, 2 A. & E. 743; *Bird v. Higginson*, 6 A. & E. 824; *Ewart v. Graham*, 29 L. J., Ex. 88; *Rogers v. St. German's Union*, 35 L. T. 332.) As these grants can only be effectual when by deed (see *Adams v. Clutterbuck*, 10 Q. B. D. 403; 52 L. J., Q. B. 607), a "reservation" of an easement or of the right of sporting must be in a lease under seal which is executed by the tenant. (*Durham Rail. Co. v. Walker*, *supra*.) Provided, however, the lease be by deed and executed by the tenant, it is immaterial that what is a re-grant is called an exception or a reservation. (*Graham v. Ewart*, 11 Ex. 326; 25 L. J., Ex. 42.) In *Houston v. Marquis of Sligo* (52 L. T. 870; 55 L. T. 614), the parcels in the lease were followed by words "excepting and reserving out of this demise" the timber and minerals, "and also by way of grant and not of reservation" the exclusive right to take and kill game: the latter words were held to be part of the reservation and not of the grant, and were construed as "and reserving by way of grant and not of reservation."

It would appear that the rights conferred by a reservation endure no longer than the lease, and are extinguished when, by the purchase of the reversion, the term becomes merged. (*Lord Dynevor v. Tennant*, 13 App. Ca. 279; 57 L. J., Ch. 1078.)

A reservation of a free passage of "water and soil" was held to mean only water in its natural condition, and such matters as are the result of the ordinary use of land for the purposes of habitation, and not to include refuse from a manufactory. (*Chadwick v. Marsden*, L. R., 2 Ex. 285; 36 L. J., Ex. 177.)

It seems that for the purposes of the Game Act (1 & 2 Will. 4, c. 32, s. 8), there may, in a parol demise, be a parol "reservation" of the game. (*Reg. v. Thurlstone*, 28 L. J., M. C. 106; *Jones v. Williams*, 46 L. J., M. C. 270; 36 L. T. 559; *Coleman v. Bathurst*, L. R., 6 Q. B. 366; 40 L. J., M. C. 131.) An agreement by the tenant not to

Parol reservation of game.

destroy but to preserve game, does not operate either way, and the right of sporting remains during the tenancy in abeyance. (*Coleman v. Bathurst, supra.*)

By the Ground Game Act, 1880 (43 & 44 Vict. c. 47), the power of the landlord to reserve "ground game" (defined by sect. 8 to mean hares and rabbits—though rabbits are not "game" within the Game Act, *Spicer v. Barnard*, 28 L. J., M. C. 176; 1 E. & E. 874)—is restricted. (*Infra*, Chap. V., sect. 9.)

Ground Game Act, 1880.

A lease must show with certainty the commencement and duration of the term. This is done in formal leases by the habendum. *The habendum.*

Leases may be made to commence either presently or at a future date, as, at Michaelmas next, or, ten years after, or, after the death of A. B. The date from which to compute the term may be a past day, as in a lease dated the 19th of July, 1851, "to hold from the 25th of December, 1849, for the term of fourteen years," the term runs from the latter date (*Bird v. Baker*, 28 L. J., Q. B. 7; 1 E. & E. 12); and it is only the same as saying that it is a term for so much as is now to come of a period of fourteen years from the 25th of December, 1849. (*Cooper v. Robinson*, 10 M. & W. 694.) But as this is only a method of estimating the duration of the term, no interest passes under it until, and then only from, the date of the lease; nor is the tenant liable in respect of breaches of covenant before that date. (*Shaw v. Kay*, 1 Ex. 412; 17 L. J., Ex. 17; *Jervis v. Tomkinson*, 26 L. J., Ex. 41; 1 H. & N. 195.)

Leases commence from a present, future, or past date.

If the date of commencement be named either in terms or by reference to the date of the instrument, and that is a sensible date, it will commence accordingly. A lease "from" a given date, as "from the 25th of March," or "from the date hereof," is generally considered exclusive of the day mentioned (*Co. Litt.* 46 b; *Ackland v. Lutley*, 9 A. & E. 879; *Wilkinson v. Gaston*, 9 Q. B. 137; *Isaacs v. Royal Insurance Co.*, 39 L. J., Ex. 189), though it may be construed either as exclusive or inclusive, according to the context and apparent intention of the parties. (*Pugh v. Duke of Leeds*, Cowp. 714.) The words "from the day of the date" and "from henceforth" mean the same thing. (*Llewelyn v. Williams*, Cro. Jac. 258.)

Meaning of "from" a given date.

If no date be named for its commencement, and the lease is by deed, or is a present demise, its commencement

Commence, when no date,

in case of a deed, or present demise,

dates from the delivery of the deed (Co. Litt. 46 b), or date of the instrument (*Doe v. Benjamin*, 9 A. & E. 644; *Furness v. Bond*, 4 Times L. R. 457), as the case may be. If on a given day A. agrees to let, and B. agrees to take, a house, and that operates as a lease or present demise at law, then, of course, the words being in the present tense, they relate to the date of the instrument, and the term commences from that date. (*Per* Jessel, M. R., *Marshall v. Berridge*, 51 L. J., Ch. 329; 19 Ch. D. 233.) And so if the lease is to hold "from the making hereof," or "from henceforth," or from any date to be ascertained by relation to the time when the lease is to commence to operate, in each case the reference must be taken to be to the delivery; for a deed has no operation until delivery. (Co. Litt. 46 b.) Thus, where a lease was dated the 25th day of March, 1783, but was not executed until some time after, and the habendum was "from the 25th of March now last past," this was held to mean the 25th of March (1783) preceding the execution, and not the one (1782) preceding the date of the lease. (*Steele v. Mart*, 4 B. & C. 279.) Where the deed has no date, or an impossible date, a lease expressed to be from the "date" commences from the delivery; but if the lease have a sensible date, the word "date" means the actual date of the lease, and not of the delivery. (*Styles v. Wardle*, 4 B. & C. 908; *Doe v. Ulph*, 13 Q. B. 204; *ante*, p. 76.)

The Court may, however, gather from the instrument itself (*Sandill v. Franklin*, L. R., 10 C. P. 377; 44 L. J., C. P. 216), or from parol evidence (*Davis v. Jones*, 25 L. J., C. P. 91; 17 C. B. 625), that the tenancy was to commence from some other date than that of the instrument. Thus, where an agreement for a tenancy was dated the 20th of December (on which day the tenant entered), and the rent was only reserved from Christmas Day,—that is, the first payment was to be made on the 25th of March,—it was held that the tenancy commenced at Christmas. (*Sandill v. Franklin*, *supra*.)

in case of a parol letting, from entry.

If no date be mentioned, and the letting is by parol, or by an instrument which does not operate as a present demise (*Marshall v. Berridge*, 19 Ch. D. 233; 51 L. J., Ch. 329), the tenancy will commence from the day of entry. (*Kemp v. Derrett*, 3 Camp. 510; *Doe v. Matthews*, 11 C. B. 675.) But where a tenant, having entered in the middle of a quarter, paid rent for that half quarter on the

next quarter day, and from that time paid rent from quarter to quarter, it was held that his tenancy commenced on the quarter day succeeding his entry. (*Doe v. Stapleton*, 3 C. & P. 275; *Doe v. Johnson*, 6 Esp. 10; *Doe v. Grafton*, 18 Q. B. 496; 21 L. J., Q. B. 276.)

It is said that a lease from a date which is not impossible but is uncertain—as from the 20th day of November, not saying in what year, is bad. (*Anon.*, 1 Mod. 180.) But it is submitted that this would not now be so held, and that the term would commence from the delivery of the deed, as in the case of a lease having no date or an impossible one. (*Anon.*, Leon. 227: 2 Pratt, 65.)

The day of commencement need not be expressly stated; it may be fixed by reference to a contingency which must happen, though the time of happening is uncertain. (Shep. Touch, 273.)

The duration of the term must be rendered certain, either by express limitation or by reference to some collateral date, which may with equal certainty measure the continuance of it, otherwise it is void. (Bac. Ab. "Leases" (L. 3).) Thus, where B. agreed to take certain premises, paying sums varying in amount up to a certain date, and after that date a rent of 9*l.* until the end of the lease, and no mention was made of the period of duration of the lease, it was held a good demise up to the time previous to the commencement of the rent of 9*l.* (*Gwynne v. Mainstone*, 3 C. & P. 302.) A lease to A. B. "during the minority of J. S." is good, and if J. S. die before majority the lease is determined. And equally good is a lease for twenty-one years, if the coverture between A. and B. shall so long continue, or if J. S. shall so long continue parson of Dale (Bac. Ab. "Leases" (L. 3),) or if the tenant shall so long continue to live in the house. (*Doe v. Clarke*, 8 East, 185.) If a man make a lease for so many years as A. shall live, no certain number being named, the lease as for a term will be void. (Shep. Touch. 275.) A lease to two for years, if they so long live, will determine by the death of one of them, but not if the contingency be, if they or *either* of them so long live. (*Daniel v. Waddington*, 1 Roll. R. 309; *Vaux's case*, Cro. Eliz. 269.)

Duration of term must be ascertained.

A lease for years, not saying how many, is a lease for two years; because for more there is no certainty; for less no sense in the words. (Bac. Ab. "Leases" (L. 3).) A demise for one year, and so on from year to year, is

a lease for two years certain. (*Doe v. Green*, 9 A. & E. 658.)

Indefinite term with agreement by landlord not to give notice to quit.

If a grantor by deed grant hereditaments to A. B. simply, and express or limit no estate, the lessee or grantee has an estate for life. (Co. Litt. 42 a; 2 Bl. Com. 121.) So if premises are let by parol in terms which, if they stood alone, would create a tenancy from year to year, with an agreement not under seal that the landlord will not give notice to quit or turn out the tenant so long as he pays the rent, or conforms to some other stipulation, the tenant is entitled in equity (and, under the authority of *Walsh v. Lonsdale*, 21 Ch. D. 9, at law) to a lease for his life if the landlord has an estate sufficient to enable him to grant such a lease; but if the landlord is himself a termor and unable to grant a lease for the tenant's life, then to a lease for the residue of the term less one day, if the tenant should so long live. (*Kusel v. Watson*, 11 Ch. D. 129; 48 L. J., Ch. 413; 27 W. R. 714; *Re King's Leaseholds*, 21 W. R. 881; L. R. 16 Eq. 521.)

If, however, an express tenancy from year to year or from week to week is created, then a proviso that the landlord shall not determine it by notice to quit, is rejected as being repugnant to the estate created. (*Doe v. Browne*, 8 East, 165; *Wood v. Beard*, 2 Ex. D. 30; 46 L. J., Q. B. 100; *Cheshire Lines Committee v. Lewis*, 50 L. J., C. P. 121; 44 L. T. 293.)

Option to determine at end of a portion of term.

A lease for a given period, determinable earlier at the option of the parties, *e. g.*, a lease for twenty-one years, determinable at the end of seven or fourteen years, is good. (*Ferguson v. Cornish*, 2 Burr. 1032; 3 T. R. 463, n; *Goodright v. Richardson*, 3 T. R. 462.) The power to determine should be accurately reserved in the case of the tenant to him and his personal representatives, and in the case of the landlord to him and his real or personal representatives, according as his reversion is a fee simple or term. (5 Dav. Conv. 341.) Though, even if it be inaccurately reserved, it will run with the land both as to the reversion and the term (*Roe v. Hayley*, *infra*), so that where the power was reserved to either party, or his executors or administrators, it was held to be exerciseable by the devisee of the reversion of a fee simple lessor. (*Ib.*) Where the option is given to each party, either, or his representatives, may determine it at one of the stated periods. (*Goodright v. Mark*, 4 M. & S. 30; *Roe v. Hayley*, 12 East, 464;

Bird v. Baker, 1 E. & E. 12; 28 L. J., Q. B. 7.) If the lease be silent as to who is to have the option, the lessee alone has it (*Dann v. Spurrier*, 3 B. & P. 399; *Price v. Dyer*, 17 Ves. 356; *Doe v. Dixon*, 9 East, 15); and this, notwithstanding the lessor supposed he had the same option. (*Powell v. Smith*, L. R., 14 Eq. 85; 41 L. J., Ch. 734.) But a lease for twenty-one years, "determinable nevertheless in seven or fourteen years, if the parties shall so think fit," is determinable only by both. (*Fowell v. Franter*, 3 H. & C. 458; 34 L. J., Ex. 6.) A stipulation that if either party should die before the end of the term his representatives might determine the lease was held not to enable the surviving party to determine it. (*Legg v. Benion*, Willes, 43.) A demise for three years "determinable on a six months' previous notice to quit by either lessor or lessee, otherwise to continue from year to year until the term shall cease by notice to quit at the usual time," was held to be a demise for three years, and not determinable sooner than by a six months' notice, ending with the third year. (*Jones v. Nixon*, 31 L. J., Ex. 505; 1 H. & C. 48.)

The proviso usually makes the payment of rent, and performance of the covenants, a condition precedent to the tenant's right to determine the lease, and in that case he cannot take advantage of the proviso, unless he has done everything it requires him to do. (*Porter v. Shephard*, 6 T. R. 665; *Friar v. Grey*, 20 L. J., Ex. 365: affirmed 4 H. L. C. 565; *M'Grath v. Shannon* (1866), 17 Ir. R., Ch. 128.)

A notice to determine the lease under such a proviso must apply to all the premises, and not to part only. (*Doe v. Archer*, 14 East, 245, 248.) Sometimes, however, the lease contains a proviso enabling the landlord to resume possession of the whole or part of the premises for building purposes or the like. (*Doe v. Abel*, 2 M. & S. 541; *Liddy v. Kennedy*, L. R., 5 H. L. 134.) But he will not be entitled to resume except for some of the purposes stated; and where the purposes were "building, planting accommodation, or otherwise," the latter words were held to be limited to purposes *ejusdem generis* with those specified. (*Johnson v. Edgware, &c. Rail. Co.*, 35 L. J., Ch. 322; 35 Beav. 480.)

Where notice is to be given to the tenant or his assigns in order to determine the tenancy, a notice to an under-

tenant is insufficient. (*Hogg v. Brooks*, 15 Q. B. D. 256; and see *infra*, Chap. VIII., s. 2.)

The reddendum.

The lease should define the amount of rent, to whom, at what time, and how to be paid. This, in formal leases, is done by the reddendum, commencing, "yielding and paying." But it may be in any form of words indicating that rent is to be paid.

Rent defined.

A rent is a certain profit issuing yearly out of lands and corporeal tenements. (Co. Litt. 144.) Though usually so, it is not necessarily, money; but it cannot be part of the profits of the demised premises, as the herbage or vesture. The following are the essential incidents of rent.

Necessary incidents of rent.

Certainty.

1. It must be certain, or capable of being rendered certain. So that rent after the rate of 18*l.* per annum was held void. (*Parker v. Harris*, 1 Salk. 262.) It is sufficient, however, if the amount, though not fixed in the reservation, is ascertainable by it. Thus, where a tenant agreed to pay so much a quarter for every yard of marl he might get, and an additional sum for every thousand bricks he might make, this was held to be sufficiently certain. (*Daniel v. Gracie*, 6 Q. B. 145; and see *infra*, Chap. VI., s. 1.)

Issue out of corporeal hereditaments.

2. It must be reserved out of something to which the lessor can have recourse to distrain. Therefore it cannot be reserved out of incorporeal hereditaments (*Bussard v. Capel*, 8 B. & C. 141); but a grant of rent in respect of things incorporeal may operate as a personal contract, and so bind the grantor. (Co. Litt. 47 a.)

Must be reserved to the lessor.

3. It must be reserved to the lessor, and not to a third party. Where the lessor is the owner of the fee, the reservation ought to be to himself, his heirs and assigns, and not to his heirs, executors, administrators and assigns; but if it be, it will nevertheless go to his heirs, because it follows the reversion. (Co. Litt. 47 a.) If rent be reserved generally by the lessor, without saying to whom, it will follow the nature of the lessor's interest, and, if he have an estate of freehold, will, after his death, go to the heir; if he have only a chattel interest, to the executor or administrator. (*Whitlock's case*, 8 Co. 71; *Sacherel v. Frogate*, 1 Vent. 161.) Inaccurate forms of reservation are of little importance in leases dated after 1881, as the Conveyancing Act, 1881, provides that rent reserved by a lease shall be annexed and incident to the reversion, and be recoverable by the person entitled subject to the term

to the income of the land leased. (44 & 45 Vict. c. 41, s. 10.) This gives statutory effect to the authorities, that a lease created by a tenant for life under a power in a settlement or statute, follows the reversion after the death of the tenant for life (*Greenaway v. Hart*, 14 C. B. 340; *Yellowly v. Gower*, 11 Ex. 274; 24 L. J., Ex. 289); and further, makes the rent of a lease granted by a mortgagor under the provisions of the 18th section of the Act, incident to the reversion of the mortgagee. (*Municipal Permanent, &c. Building Society v. Smith*, 22 Q. B. D. 70; 58 L. J., Q. B. 61.)

It is not necessary to reserve one entire sum in respect of the whole premises demised. Distinct rents may be payable in respect of distinct parcels, or one portion of the premises may be burthened with the whole amount in exoneration of the rest. (*Knight's case*, 5 Co. 54 b.) There is a difference between a reservation of several distinct rents and a reservation of an entire rent with a subsequent apportionment of it upon the several parcels demised. Thus a lease of several houses at the annual rent of 5*l.*, viz., for one house 3*l.*, for another 10*s.*, and for the rest of the houses the residue of the said rent of 5*l.*, with a proviso for re-entry into all the houses on non-payment of any parcel of the rent, is but one reservation of one entire rent, because all the houses are leased at one entire rent and the "viz." does not sever the reservation, but only declares the value of each house. But a lease of three houses rendering for one 3*l.*, for another 20*s.*, and for the third 20*s.*, with a condition to re-enter into all for the non-payment of any parcel of rent, amounts to three several reservations in the nature of three distinct demises; and each house, in this case, would only be chargeable with its own rent, and the non-payment of the rent of one house could be no cause of entry into another. (Bac. Ab. "Rent" (E); Gilb. Rents, 34, 35.) Several rents may be made payable at different times, as, for instance, one rent yearly, another quarterly. (*Coomber v. Howard*, 1 C. B. 440.)

Reservations
of entire or
several rents.

Where there is a demise of premises at an entire rent, if the demise fails as to any part of the premises, the whole demise is void. (*Doe v. Lloyd*, 3 Esp. 78; *Neale v. Mackenzie*, 1 M. & W. 747, ante, p. 74.) But where the owners in fee simple leased by deed certain lands, the greater portion of which was in their own possession, but a small portion was in possession of a tenant under a prior

lease, it was held, in an action for the entire rent, that the lease was valid, operating as a lease in possession of that portion of which the lessors had possession at the time of the demise, and as a lease of the reversion with the rent incident thereto of that portion of which they had not the possession. (*Ecclesiastical Commissioners of Ireland v. O'Connor* (1858), 9 Ir. C. L. R. 242.)

Covenants.

By the consent and to effect the intention of the parties, leases usually contain covenants varying with the nature of the property and its locality, and very often following a common form in use by the landlord or in the locality.

Defined.

A covenant is merely a promise or agreement by deed. (1 Shep. Touch. 160.)

Express or implied.

Covenants are either in deed or in law, or, according to the more common form of expression, are either expressed or implied. A covenant in law is an agreement which the law infers from words by which the relation of landlord and tenant is created, or from the very relationship itself. "A covenant of this nature and description is sometimes (though it would seem improperly) called an implied covenant, whereas an implied covenant, in its proper legal sense, is a covenant not formally nor expressly stated in the deed, but which is to be collected by construction and inference from the terms used in it; and we think an implied covenant in its proper sense is not to be distinguished in its effect or legal consequence from an express covenant." (*Williams v. Burrell*, 1 C. B. 429; 14 L. J., C. P. 104, *per cur.*) But notwithstanding this disapproval, covenants in law are almost invariably referred to as "implied covenants" (see *Penfold v. Abbott*, 32 L. J., Q. B. 67; *Schwartz v. Locket*, 61 L. T. 719), while covenants arising by construction and inference are treated as express or constructive covenants. The law implies what are termed "usual" covenants. These are, on the part of the tenant, (1) to pay rent; (2) to pay taxes (except landlord's taxes); (3) to keep and deliver up premises in repair; (4) to cultivate land in accordance with good husbandry; (5) to permit the landlord to enter and view the state of repairs; and, on the part of the landlord, (6) for quiet enjoyment until default. (See 2 Platt on Leases, 155—162; *infra*, Sect. 2.) These several covenants are considered more at length in Chap. V.

An express covenant qualifies the generality of an implied one. Thus, an implied covenant for quiet enjoyment

will be restrained by an express covenant for quiet enjoyment. (*Merrill v. Frame*, 4 Taunt. 329; *Line v. Stephenson*, 4 Bing. N. C. 678.)

An implied covenant, so far as the lessor's liability is concerned, ceases with the determination of his estate (*Penfold v. Abbott*, 32 L. J., Q. B. 67), and so far as the lessee is concerned, ceases with the determination of the privity of estate by assignment of the term. Under an express covenant, although arising by construction only, the obligation continues during the whole of the term granted by the lease, notwithstanding, in the case of the landlord, his estate may have determined (*Williams v. Burrell*, 1 C. B. 402; 14 L. J., C. P. 98), or, in the case of the tenant, the lease may have been assigned over. (See *Auriol v. Mills*, 4 T. R. 98.)

Covenants are also distinguished as such as run with the land, and such as are merely personal. A covenant running with the land is one which affects the nature, quality or value of the land demised, or the mode of enjoying it, independently of collateral circumstances. Such a covenant binds not only the covenantor during his lifetime, and his representatives after his death in respect of his assets, by privity of contract, but also every person who enters into possession of the estate demised under the original lease, such person being affected by privity of estate.

Covenants running with the land, or personal.

A personal covenant is one which does not affect the land demised, but is merely collateral to it. Instead, therefore, of binding the persons entering into possession as assigns, it affects only the covenantor during his life, and the assets in the hands of his representatives after his death, by reason of the privity of contract. The subject of covenants running with the land is dealt with more fully under the head of assignments, *infra*, Chap. X., Sect. 1.

No precise form of words is necessary to constitute an express covenant. (Platt on Covenants, 28.) It may be inserted in any part of the deed, and may be either an ordinary covenant, or in the form of a condition, a proviso, an exception, or even a recital (*Rigby v. Great Western Rail. Co.*, 14 M. & W. 811; *Sampson v. Easterby*, 9 B. & C. 512; *Saltoun v. Houston*, 1 Bing. 433; *Carr v. Roberts*, 5 B. & Ad. 78; *Brookes v. Drysdale*, 3 C. P. D. 52; 26 W. R. 331); and if it clearly appear that it was the intention of the party to bind himself for its performance, it

Form and expression of covenant.

will be construed as a covenant. (*Ib.*; *Knight v. Gravesend Waterworks Co.*, 2 H. & N. 6; 27 L. J., Ex. 73.)

Covenant imported by—

a declaration of intention ;

a recital ;

an exception ;

a proviso ;

a condition ;

It is always matter of construction to discover what is the sense and meaning of the words employed by the parties. (*Williams v. Burrell*, 1 C. B. 402; 14 L. J., C. P. 98.) If it is ascertained that the meaning is, that one of the parties agrees to do a certain thing, that amounts to a covenant. (*Ib.*) Thus, where a lease contained a clause “declaring” it to be the intention of the lessors and the understanding of the lessee that the lessors should do certain acts, and the lessors thereby “engaged” not to do any act which should have an effect contrary to the above intention, it was held to amount to a covenant. (*Rigby v. Great Western Rail. Co.*, 14 M. & W. 811.) A lease containing a recital of an agreement by a lessee to build a mill, followed by a covenant to repair and yield up in repair the new mill, but no covenant to build it, was held to amount to a covenant to build it. (*Sampson v. Easterby*, 9 B. & C. 505.) It is said, however, that “the Court ought to be cautious in spelling a covenant out of a recital in a deed, because that is not the part of a deed in which covenants are usually expressed.” (*Farrall v. Hilditch*, 28 L. J., C. P. 221; 5 C. B., N. S. 854.) Where a lessee covenanted that he would at all times plough, sow, manure, and cultivate the demised premises, *except* the rabbit-warren and sheep-walk, this was held a covenant not to plough the rabbit-warren and sheep-walk. (*St. Albans v. Ellis*, 16 East, 352.) If a lessee covenant to repair, “provided always, and it is agreed that the lessor shall find great timber,” this amounts to a covenant by the lessor to find great timbers (Roll. Ab. 518; Bac. Ab. “Covenant” (A.)), though without the word “agreed” it would not. (*Ib.*) So a lease for years, upon condition that the lessee will keep and leave the premises in as good plight as he found them, will amount to a covenant to leave them in good repair at the end of the term. (*Ib.*)

But it must be clear that the words are intended to operate as an agreement, and not merely as words of condition or qualification; for a mere proviso at the end of a covenant by the one party will not be construed as a covenant by the other party. (*Treloar v. Bigge*, 43 L. J., Ex. 95; L. R., 9 Ex. 151; *Smith v. Mayor of Harwich*, 2 C. B., N. S. 651; 26 L. J., C. P. 257; *Sear v. House Pro-*

perty and Investment Co., 16 Ch. D. 387; 50 L. J., Ch. 77.) Thus, where there was a covenant not to assign, without the consent of the landlord, "but such consent not to be unreasonably withheld,"—the latter words were held not to amount to a covenant by the landlord not to unreasonably withhold his consent. (*Sear v. House Property and Investment Co.*, *supra.*) And where a lessee assigned the unexpired residue of the term *subject* to the payment of the rent and performance of the covenants and agreements in the original lease, it was held not to amount to a covenant with the assignor to that effect. (*Wolveridge v. Steuard*, 1 C. & M. 657.)

Every covenant is to be expounded with regard to its context, and such exposition must be upon the whole instrument, *ex antecedentibus et consequentibus*, and according to the reasonable sense and construction of the words (*Iggulden v. May*, 7 East, 241), and to give effect to the apparent intention of the parties. Thus, a covenant by a lessee "that he shall at all times during the term fold the flock of sheep which he shall keep upon the demised premises upon such parts where the same have been usually folded," was held to impose upon the tenant the obligation to keep a flock of sheep on the premises. (*Webb v. Plummer*, 2 B. & Ald. 746.) A covenant by the lessee at all times and seasons of burning lime to supply the lessor and his tenants with lime at a stipulated price, was held to impose the obligation to burn lime at all such seasons. (*Shrewsbury v. Gould*, 2 B. & Ald. 487.) If a man act contrary to the intention of his covenant it shall be a breach, although he perform the words of his covenant; as if a man covenants to leave all the trees upon the land, and he cuts them down and leaves them there. (Com. Dig. Covenant (E. 2).)

When two or more persons join in a covenant, the question whether it is joint or several depends upon the words used. If the several persons covenant generally for themselves without words of severance, the covenant is joint only, and not several. (Shep. Touch. 375; *Lery v. Sale*, 37 L. T. 709.) If they covenant severally, or each for himself, the liability is separate. If they covenant jointly and severally, or for themselves and each of them, the obligation is both joint and several. Where the covenant is in terms which import without ambiguity a joint and not a several obligation, a covenant must be held to be

Construction
of covenant.

Joint or
several.

a joint one, notwithstanding the habendum in the lease is expressly to the covenantors as tenants in common. (*White v. Tyndall*, 13 App. Ca. 263; 57 L. J., P. C. 114.) Where the terms are ambiguous and may import either a joint or several obligation, then the covenant may be construed to be joint or several according to the interests of the covenantors, or any other circumstances appearing on the face of the instrument, which will aid in determining the intention of the parties. (*Ib.*; *per* Lord Herschell; *Sorsbie v. Park*, 12 M. & W. 146.) The distinction is chiefly important with reference to the death of one of the covenantors, for although where several persons enter into a joint covenant each is liable for the whole performance during his life (Leake, *Contracts*, 448), upon the death of one of several joint covenantors the liability under the covenant (except in partnership cases, 1 Lindley, 193) devolves upon the survivors, and the estate of the deceased is not liable. (*Levy v. Sale*, 37 L. T. 709; *White v. Tyndall*, *supra*.) If the covenant is several, or joint and several, the estate of the deceased covenantor remains liable. (2 Wms. Exors. 1741.) General words at the commencement of covenants, whereby the lessees “jointly and severally covenant in manner following,” extend to all the subsequent covenants. (*Duke of Northumberland v. Errington*, 5 T. R. 522.) And where there was a covenant by a lessee and his surety that they would pay the rent, and further, that the tenant would repair, it was held that the surety had bound himself by the covenant to repair as well as the covenant to pay rent, notwithstanding an express recital that the surety had joined to secure payment of the rent. (*Copland v. Laporte*, 3 A. & E. 517.)

Independent
covenants and
conditions
precedent.

When a lease contains mutual covenants and stipulations by the lessor and lessee, questions sometimes arise as to whether the obligations are independent, or the obligation of the one is dependent or conditional upon the due performance of the obligation of the other. It has been laid down by two eminent authorities (*Acherley v. Vernon*, Willes, 157 n.; *Kingston v. Preston*, 2 Doug. 690), in slightly different language, that in this respect covenants are divisible into three classes—viz., (1.) Those of mutual and independent covenants, where either party may maintain an action on the covenant to be performed by the other without performance of the covenants on his part, and to which action non-performance of the plaintiff's

covenants is no defence (*Boone v. Eyre*, 1 H. Bl. 273, n.)—though it would be subject for a counterclaim or cross-action. (2.) Those of dependent and concurrent covenants, where the act of each party is to be done at the same time, and where, if one party was ready and offered to perform his part, he who was ready and offered has fulfilled his engagement, and may maintain an action for the default of the other (*Jones v. Barkley*, 2 Doug. 684; *Morton v. Lamb*, 7 T. R. 125); and (3.) Those of dependent covenants or conditions precedent in which the performance of one act depends on the prior performance of another act by the other party, and where, until the prior act is performed, no right is vested in the party who ought to perform it, nor is the other party liable to an action on his covenant. (*Thomas v. Cadwallader*, Willes, 496.)

Whether covenants are dependent or independent is to be determined by the intention of the parties as it appears on the instrument, and by the application of common sense in each particular case. (*Stavers v. Curling*, 3 Bing. N. C. 368; *Roberts v. Brett*, 25 L. J., C. P. 286; 18 C. B. 573.) Where two covenants in a deed have no relation to each other (*per* Willes, C. J., in *Thomas v. Cadwallader*, Willes, 499), or when mutual covenants go only to part of the consideration on each side (*Ritchie v. Atkinson*, 10 East, 295; *Newson v. Smythies*, 3 H. & N. 840; 28 L. J. Ex. 97), they are treated as independent covenants. Nor is a condition precedent created where one party covenants to do one thing, the other party “doing or performing” another (*Boone v. Eyre*, 2 W. Bl. 1312); nor by one party covenanting to do something “on the performance of the before-mentioned terms and conditions” (*Stavers v. Curling*, 3 Bing. N. C. 355); nor by one party covenanting to do an act, the other “paying compensation” (*Doe v. Kennard*, 12 Q. B. 244), or the like. On the other hand, a covenant by the tenant to keep the premises in repair, the same being first put into repair by the landlord, is conditional. (*Neale v. Ratcliffe*, 15 Q. B. 916; 20 L. J., Q. B. 130, *infra*, Chap. V., “REPAIRS.”) So is a stipulation enabling the tenant to determine the lease upon giving a certain notice, “all the arrears of rent being paid, and all and singular the covenants and agreements on the part of the lessee having been duly observed and performed.” (*Friar v. Grey*, 5 Ex. 584, *ante*, p. 95.) So is a covenant to renew “upon the lessee paying the rent and performing

the covenants of the present lease.” (*Bastin v. Bidwell*, 18 Ch. D. 238, *ante*, p. 20.) But an agreement to let land for building in the ordinary form, by which the builder agrees to build certain houses upon the land, and the ground landlord agrees to grant leases of the houses to be built at separate ground rents, is in general intended to be divisible, and to entitle the builder to have a lease of each house when finished, without the condition precedent of finishing all the houses. (*Wilkinson v. Clements*, L. R., 8 Ch. 96; 42 L. J., Ch. 38.)

Illegal or impossible covenants.

A lease granted for the purpose of carrying out an object which is immoral or prejudicial to the public interest, or otherwise contrary to law, is void (*Shep. Touch.* 163); nor can an action be maintained upon any of the covenants (*Smith v. White*, 35 L. J., Ch. 454; L. R., 1 Eq. 626), notwithstanding the unlawful act has not been carried into effect. (*Gaslight and Coke Co. v. Turner*, 6 Bing. N. C. 324.) A covenant to do a thing which is impossible at the date of the covenant is void. But provided they are not illegal or impossible, the parties may attach such conditions as they deem fit to a demise, and secure the observance of those conditions by covenants. (*Jones v. Jones*, 12 Ves. 189.) The rights and duties of the parties under covenants will be dealt with in the subsequent parts of the work relating to those matters which the covenants affect.

Anticipatory repudiation.

Where a lease contains a number of covenants, the doctrine of anticipatory repudiation does not apply, so that the one party cannot treat a declaration of inability to perform, before the time for performance, as a repudiation of the covenant by the other party, giving an immediate right of action. (*Johnstone v. Milling*, 34 W. R. 238; 55 L. J., Q. B. 162; 16 Q. B. D. 460.)

Execution.

Lease by deed must be sealed and delivered.

To make an instrument of demise a deed, it must be sealed and delivered by the lessor and the lessee; but according to the balance of authority, the first section of the Statute of Frauds, requiring leases to be signed, does not apply to leases by deed. (*Cooch v. Goodman*, 2 Q. B. 580; *Aveline v. Whisson*, 4 M. & Gr. 801; and see *Cherry v. Heming*, 4 Ex. 631; 19 L. J., Ex. 63.) It is not necessary, to constitute sealing, that there should be either wax or wafer, or any actual impression; the deed may be sealed by using a bit of paper, or by the end of a ruler, without making any impression or mark. And where an instrument is in the

form of a deed, and on proper stamps, and it is stated in the attestation to have been sealed and delivered in the presence of the witnesses, it will, in the absence of proof to the contrary, be presumed to have been sealed, though no impression appear. (*Re Mayer*, 40 L. J., C. P. 201; S. C., *sub nom. Re Sandilands*, L. R., 6 C. P. 411; Sug. Powers, 232. But see *National Prov. Bank of England v. Jackson*, 33 Ch. D. 1; 34 W. R. 597; *Re Balkis Consolidated Co.*, 58 L. T. 300; *Oswell v. Shepherd*, 67 L. T. 64.) In modern practice the kind of seal made use of is not regarded; and merely placing the finger on a seal already made is equivalent to sealing (Shep. Touch. 57); and the words "I deliver this as my act and deed," which are spoken at the same time, are regarded as equivalent to delivery, even if the party keep the deed himself. (*Doe v. Knight*, 5 B. & C. 671; *Xenos v. Wickham*, L. R., 2 H. L. 296; 36 L. J., C. P. 313.) Where a delivery is conditional, and only to take effect upon the happening of some event, or the performance of some act, it is a mere escrow (*Gudgen v. Besset*, 6 E. & B. 986); but on the performance of the condition it takes effect as a deed. (Co. Litt. 36 a.) Possession by a party of a deed executed to him, is *prima facie* evidence of its having been delivered to him as a deed. (*Hare v. Horton*, 5 B. & Ad. 715.)

Formerly, a lease executed by an attorney must have been in the name of the principal, and not of the attorney. Execution by attorney. (*Frontin v. Small*, 2 Ld. Raym. 1418; *Berkeley v. Hardy*, 5 B. & C. 355.) The correct form was, "In witness whereof A. B. by C. D., his attorney, has hereunto set his hand and seal." But it did not matter in what form of words the execution was, if in the name of the principal; thus, "for J. B. (the principal), M. W. (the attorney)," was held sufficient. (*Wilks v. Back*, 2 East, 142.) Now, the donee of a power of attorney (whether created before or after the 31st December, 1881) may, if he thinks fit, execute any instrument in and with his own name and his own seal, where sealing is required, by the authority of the donor of the power, and when so executed it shall be as valid as if done with the signature and seal of the donor of the power. (44 & 45 Vict. c. 41, s. 46; and see 45 & 46 Vict. c. 39, ss. 8, 9.)

The attorney must have an authority in writing, and when the lease is by deed the authority must be under seal. (Co. Litt. 486; *Berkeley v. Hardy*, *supra*.)

Effect of non-execution of lease by lessor.

An instrument which is not executed by the lessor is no lease. (*Soprani v. Skurro*, Yelv. 19; *Doe v. Wiggins*, 4 Q. B. 367.) If there are two or more lessors, they should all execute, for no more than the shares of those who do will pass. (Co. Litt. 192 a.) And though in an ordinary indenture a covenantee may sue the covenantor, although the former has not executed the deed (*Morgan v. Pike*, 14 C. B. 473), yet in the case of a lease not executed by the lessor, the covenants on the part of the lessee would not at law be binding upon him, though he had executed it (*Swatman v. Ambler*, 8 Ex. 72; 22 L. J., Ex. 81; *Pitman v. Woodbury*, 3 Ex. 4), unless perhaps in the event of his being allowed to enjoy during the whole contemplated term. (*Cooch v. Goodman*, 2 Q. B. 580.) But it would now appear that under the decision of *Walsh v. Lonsdale* (21 Ch. D. 9, ante, p. 75), after entry under an instrument specifically enforceable against him, the tenant would be liable, and even at common law the lease would regulate the holding as a tenancy from year to year. (See *Bolton v. Tomlin*, 5 A. & E. 856.)

Non-execution by lessee.

If a lessee has neither sealed and delivered the indenture of lease, nor entered and taken possession, he cannot be made responsible upon the covenants; but if he enters and takes possession by force of the lease he is deemed to have covenanted to hold upon the terms of the indenture, and to observe the conditions of the lease. (*Brett v. Cumberland*, Cro. Jac. 521; *Mayor, &c. of Lyme v. Henley*, 1 Bing. N. C. 237.)

Indorsements and alterations.

An indorsement upon a deed will, in the absence of proof, be presumed to have been made before the execution of the deed, and so to be parcel of it. (*Brewster v. Kidgell*, Carth. 438; *Flint v. Brandon*, 1 B. & P. N. R. 73.) And if made after the signing of the deed, but before delivery, it will be taken as part of the deed. (*Lyburn v. Warrington*, 1 Stark. 162.)

So, erasures and interlineations are presumed to have been made at the time of the execution of the deed. (*Doe v. Cattamore*, 20 L. J., Q. B. 364; 16 Q. B. 745.)

After execution of a lease.

As a deed can only be varied by an instrument of as high a nature as itself, after it is once delivered, any variation of its terms or additions thereto, by indorsement or otherwise, must be by a fresh deed, duly stamped (*West v. Blakeway*, 2 M. & Gr. 751; *Roe v. Harrison*, 2 T. R. 425; *Cordwent v. Hunt*, 8 Taunt. 596); and in such case the

alterations will be taken as a new lease, incorporating such of the terms of the old lease as are not expressly varied. (See *Doe v. Geekie*, 5 Q. B. 841; 13 L. J., Q. B. 239.)

If, in a lease, there is a discrepancy between the habendum and the reddendum, the habendum will prevail. If the lease and the counterpart differ, the lease overrides the counterpart. (Shep. Touch. 52, 53.) But the first rule does not apply where it appears upon the face of the lease, construed with the counterpart, that the habendum is wrong; and the second rule does not apply where the lease is inconsistent with itself, and the counterpart is consistent throughout. (*Burchell v. Clark*, 46 L. J., C. P. 115; 2 C. P. D. 88; 25 W. R. 334.) Therefore, where the term mentioned in the reddendum of a lease differed from that stated in the habendum, but the counterpart throughout stated the term as in the reddendum, the habendum was corrected so as to agree with the reddendum. (*Ib.*) But this will only be done in the case of deeds. (*Ingleby v. Slack*, 6 Times L. R. 284.)

Mistake.

Where owing to mistake, which must be clearly established by the plaintiff (*Fowler v. Fowler*, 4 De G. & J. 250, 265; *Seaton v. Staniland*, 4 Giff. 61), a lease as executed does not embody the intentions of either of the parties, it will be rectified by the Court. The Court will not, however, rectify a spent agreement. (*Caird v. Moss*, 33 Ch. D. 22; 55 L. J., Ch. 854.) There can be no rectification if the mistake be not mutual or common to all parties to the instrument. (*Murray v. Parker*, 19 Beav. 305; *Earl Beauchamp v. Winn*, L. R., 6 H. L. 223; *Duke of Sutherland v. Heathcote*, [1892] 1 Ch. 475; 66 L. T. 213; Kerr on Frauds 498.) Parol evidence of the mistake may be given (*Price v. Ley*, 32 L. J., Ch. 530), but not to rectify a lease prepared in strict conformity with a previous written agreement. (*Davies v. Fitton*, 2 Dr. & W. 225.)

Rectification on ground of mistake.

A mistake on one side only may be ground for rescinding, not for rectifying, an agreement. (*Mortimer v. Shortall*, 2 Dr. & W. 363.) But in such a case the Court may give to a defendant the option of taking what plaintiff meant to give in lieu of rescission. (*Paget v. Marshall*, 28 Ch. D. 225, *infra*.) Thus, where a lessor by mistake inserted in the draft lease a less sum for the rent than that agreed upon, and it was in that form engrossed and executed, it was held that the lessee was entitled to retain or reject the lease; but, if retained, it must be reformed by the insertion

of the higher rent agreed upon. (*Garrard v. Frankel*, 31 L. J., Ch. 604; 30 Beav. 445.) And where there had been a mistake in the parcels in an executed lease, although a mistake by the plaintiff only, the Court ordered the annulment or, at the option of the defendant, the rectification of the lease. (*Paget v. Marshall*, 51 L. T. 351; 28 Ch. D. 255; 54 L. J., Ch. 575; and see *Mackenzie v. Hesketh*, 7 Ch. D. 675; 26 W. R. 189.) Usually, however, in the absence of fraud or *quasi*-fraud the mistake of one party not contributed to by the other party is no ground for resisting specific performance, much less for setting aside the contract after it has been executed and the lease granted. (*Tamplin v. James*, 15 Ch. D. 215; 29 W. R. 311; 43 L. T. 520; *Harris v. Pepperell*, L. R., 5 Eq. 1; 16 W. R. 68.)

Sureties for
the lessee.

Very often the payment of rent and the performance of the lessee's covenants or stipulations are secured by sureties, either by a bond (*Holme v. Brunskill*, 47 L. J., C. P. 81, 610; 3 Q. B. D. 495), by a separate guarantee (*Tayleur v. Wildin*, 37 L. J., Ex. 173; L. R., 3 Ex. 303), or more frequently by their joining in the lease. (*Toler v. Slater*, 37 L. J., Q. B. 33; L. R., 3 Q. B. 42.) However created, the liability of the surety will be strictly construed (*Whitcher v. Hall*, 5 B. & C. 269), and will not make him liable beyond the original tenancy, when a new tenancy is created by waiver of a notice to quit. (*Tayleur v. Wildin*, *supra*.) The surety will also be discharged by any new arrangement between the landlord and tenant, not assented to by the surety, varying the original agreement, unless it is self-evident that the alteration cannot prejudice the surety. (*Holme v. Brunskill*, *supra*; *Taylor v. Bank of New South Wales*, 11 App. Cas. 596; 55 L. J., P. C. 47.) If a demise is to two persons jointly, evidence is not admissible of intention that one only should be tenant, and the other a surety.

Registration.

In some cases leases of property in Middlesex and Yorkshire require to be registered. By 7 Anne, c. 20, and 54 & 55 Vict. c. 64, as regards Middlesex; by 2 & 3 Anne, c. 4, and 5 Anne, c. 18, as regards the West Riding of Yorkshire; by 6 Anne, c. 35, as regards the East Riding and Kingston-upon-Hull; by 8 Geo. 2, c. 6, as regards the North Riding (and as to all, see 37 & 38 Vict. c. 78), a memorial of all deeds and conveyances, and of all wills and devises in writing, concerning and whereby any heredita-

ments may be in any way affected in law or equity, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such memorial thereof be registered, as by the Act is directed, before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim. The Acts (except the West Riding Act) do not extend to any copyhold estates, leases at rack rent or for a term not exceeding twenty-one years, when the actual possession and occupation go with the lease, or to any chambers in Serjeant's Inn or the Inns of Court or Chancery in Middlesex. It is, however, considered advisable, though not clearly necessary, to register leases of copyholds where leases of freeholds would be registered, the leases being a common law interest. (Sug. V. & P. 732, 14th ed.) Although Serjeant's Inn is within the City of London, it is considered that the exception of it from the operation of the Act was an error, and does not imply that assurances within the city must generally be registered, and this understanding is usually acted upon in practice. (*Ib.*) Registering an assignment is not registering the lease. (*Honeycomb v. Waldron*, 2 Stra. 1064; *Roue v. Brenton*, 8 B. & C. 755.) By 15 Car. 2, c. 17, leases in the Bedford Level, "except leases for seven years or under, in possession," must be registered.

It is not necessary that one of the witnesses attesting the memorial to be enrolled in the Middlesex Registry should be a witness to the execution by the grantor. (*Reg. v. Truro*, 35 W. R. 808.)

As from the 1st of January, 1885, the registration of leases in the three ridings of Yorkshire and the town and county of Kingston-upon-Hull, are regulated by the Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), which differs in one or two respects from the old Acts. The former Acts, as we have seen, excepted from registration leases at a rack rent or for a term not exceeding twenty-one years when the actual possession *and occupation* go with the lease. Leases at a rack rent are no longer excepted, but only copyholds and "any lease not exceeding twenty-one years, or any assignment thereof, where accompanied by actual possession from the making of such lease or assignment." (Sect. 28.) The word "occupation" is now omitted, and it would seem that "actual possession" is satisfied by the receipt of income. (See "possession"

Yorkshire
Registries
Act, 1884.

defined C. A. 1881, s. 2, sub-s. 3; S. L. A. 1882, s. 2 (10) (i).) Under the old Acts, in order to avoid registration, there must have been actual occupation, mere receipt of the rents was not sufficient. (2 Dart, V. & P. 769; Sugden, V. & P. 602.)

38 & 39 Vict.
c. 87, s. 11.

By 38 & 39 Vict. c. 87, s. 11, registration is extended to leaseholds in whatever part of England situated. But the registration is optional, and is only possible where the lease is for a life or lives, or determinable on a life or lives, or for a term of years of which more than twenty-one years are unexpired, and the lease must not contain an absolute prohibition against alienation. And it is provided by sect. 127, that lands within the jurisdiction of the before-mentioned local registries (other than the Bedford Level), if registered under that Act, shall, from the date of registration, be exempt from the jurisdiction of such local registries.

Expenses of
lease and
counterpart.

In the absence of express stipulation, a lease is always prepared by the solicitor of the lessor at the expense of the lessee. The lessor is, however, liable to the solicitor in the first instance, and upon paying the charges he may recover the amount from the lessee (*Grissell v. Robinson*, 3 Bing. N. C. 10; *Helps v. Clayton*, 34 L. J., C. P. 4, 6, *per Willes, J.*); but the lessee will not be directly liable to the solicitor unless he has undertaken to be so, of which very slight evidence is sufficient. (*Smith v. Clegg*, 27 L. J., Ex. 300; *Webb v. Rhodes*, 3 Bing. N. C. 732.)

The expense of the counterpart is borne by the lessor (2 Platt on Leases, 539), unless there is an agreement to the contrary (*Jennings v. Major*, 8 C. & P. 61); and an agreement that the lease is to be prepared at the tenant's cost does not include the counterpart. (*Ib.*) The lessor cannot insist on the counterpart being executed in the presence of himself or his agent. (*Borradaile v. Smart*, 5 W. R. 270.)

Amount of
solicitor's
charges.

Under the provisions of the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), solicitor and client may, by an agreement in writing, agree on the form and amount of remuneration for any business done by the former. (Sect. 8.) Subject thereto, the remuneration of solicitors in respect of business in connection with leases and agreements for leases is prescribed by the scale given in the General Order of 1882, made in pursuance of that Act. (See *Savery v. Enfield Local Board*, in H. L. 95 L. T. Jour. 8.) By this scale, if the lease be at a rack rent (and not a mining or building lease), the charges are limited to 7*l.* 10*s.*

per cent. on a rental not exceeding 100*l.*, but not less in any case than 5*l.*; where the rent exceeds 100*l.* and does not exceed 500*l.*, to 7*l.* 10*s.* on the first 100*l.*, and 2*l.* 10*s.* on each additional 100*l.*; and where the rent exceeds 500*l.* to the same charges up to 500*l.*, and 1*l.* in respect of every additional 100*l.* The lessee's solicitor is entitled to one-half the above charges. A higher percentage rate of remuneration is provided in the case of building leases, and long leases not at rack rent (except mining leases). A solicitor concerned for both parties is to charge the lessor's solicitor's charges and one-half of that of the lessee's solicitor.

The above scale is not to include stamps, counsel's fees, or other disbursements reasonably and properly paid.

During the continuance of the demise, the tenant is entitled to the custody of the lease, and he continues so entitled even after the term created has expired, whether by effluxion of time or forfeiture. (*Hall v. Ball*, 10 L. J., C. P. 285; *Elcorthy v. Sandford*, 34 L. J., Ex. 42; 3 H. & C. 330; but see *Clarkson v. Woodhouse*, 5 T. R. 412.) Where there is a lease, executed by both parties, and no counterpart, the tenant who has custody of it is bound to produce it for the landlord to inspect and take copies, even for the purpose of an ejectment. (2 Platt, 542.)

Custody of lease.

Possession under the instrument is necessary to complete a lease for years at common law. So that after a lease has been granted, and before actual entry has been made by the lessee, he is for many purposes not a tenant. (Co. Litt. 46 b; 1 Saund. 251.) Except in the case of a freehold lease (*Ecclesiastical Commissioners for England v. Treemer*, 41 W. R. 166; [1893] 1 Ch. 166) the demise only gives him a right of entry on the tenement, which is called his interest in the term, or *interesse termini*, and this he may assign, or if he dies it will pass to his personal representatives. (Co. Litt. 46 b.) A lessee under a parol lease not exceeding three years, which is valid under sect. 2 of the Statute of Frauds, is in the same position, for until entry he has a mere *interesse termini*. Where, however, one of two lessees is in possession, there is a vested interest in possession in both, without further entry. (*Keyse v. Powell*, 2 E. & B. 132; 22 L. J., Q. B. 305.)

Entry of lessee.

Interesse termini.

At any time during the term, even after the death of the lessor, the lessee or his assigns or personal representatives may perfect the lease by entry or some act equiva-

lent thereto. (Co. Litt. 46 b; *Copeland v. Stephens*, 1 B. & Ald. 605.) Until entry, although the tenant has the right to maintain an action against a third party for injury to the premises (*Gillard v. Cheshire Lines Co.*, 32 W. R. 943), or an action of ejectment (*Doe v. Day*, 2 Q. B. 147, 156; 12 L. J., Q. B. 86, 88), or an action against his landlord for not putting him in possession (*Wallis v. Hands*, 37 Sol. J. 284), he cannot maintain an action for trespass, since such an action is founded on the actual possession of the plaintiff during the time in respect of which the action is brought. (*Ryan v. Clarke*, 18 L. J., Q. B. 267; 14 Q. B. 73; *Harrison v. Blackburn*, 34 L. J., C. P. 109; 17 C. B., N. S. 678; *Turner v. Cameron's Coalbrook Co.*, 20 L. J., Ex. 71; 5 Ex. 932; *Wallis v. Hands*, 37 Sol. J. 284.)

On the other hand, until entry an action for use and occupation will not lie against the tenant (*Edge v. Strafford*, 1 Cr. & J. 391; *Lowe v. Ross*, 5 Ex. 553; 19 L. J., Ex. 318; *Towne v. D'Heinriche*, 13 C. B. 892; 22 L. J., C. P. 219), nor an action for damages for not occupying and becoming tenant. But whatever remedy can be had upon the lease in its character of a contract may be resorted to. A tenant becomes liable to pay the reserved rent though he never enters. (*Bellasis v. Burbriche*, 1 Ld. Raym. 170.)

SECT. 2.—*Agreements for Leases.*

Informal instruments of tenancy;

In many cases the rights of the parties, instead of being ascertainable from formal leases, are governed by mere agreements or by instruments purporting to be leases, but void as such by reason of not being under seal.

remedies under, depend upon possession taken or not,

In such cases the rights and remedies of the parties will depend to a great extent upon whether or not possession has been taken of the property under the instrument. If possession has not been taken, the remedy is upon the contract to grant or accept a tenancy. If possession has been taken, and the contract is one which would be specifically enforced, the remedy is upon the tenancy on the terms of the agreement, which would then be treated as existing in law. (*Walsh v. Lonsdale*, 21 Ch. D. 9; 52 L. J., Ch. 2; *Louther v. Heaver*, 41 Ch. D. 264.) But the equitable doctrine that the tenant so in possession is to be treated as

and jurisdiction of Court to enforce performance.

if a valid lease were in existence (see below) can only be recognised in a Court which in the particular case has equitable jurisdiction to grant specific performance. (*Foster v. Reeres*, [1892] 2 Q. B. 255; 61 L. J., Q. B. 763.) Where, therefore, the value of the property exceeds 500*l.*, so that it is outside the jurisdiction of the County Court in reference to specific performance, a County Court judge can grant no relief which could not be claimed independently of the right to specific performance of the agreement. (*Ib.*)

As no formal words are requisite to make a demise, it was frequently a question before 8 & 9 Vict. c. 106, s. 3 (*ante*, p. 73), which provided, in effect, that leases for more than three years should be void unless by deed, whether a document was an actual lease, or only an agreement for one. In *Stratton v. Pettit* (16 C. B. 420), it was held that a lease void as such was void altogether. But this decision was overruled; and it is now settled that a lease in writing not under seal, though void as a lease, will operate as an agreement for the term and upon the conditions therein specified (*Bond v. Rosling*, 30 L. J., Q. B. 227; *Rollason v. Leon*, 31 L. J., Ex. 96; *Tidey v. Mollett*, 33 L. J., C. P. 235; 16 C. B., N. S. 298), and as an agreement may be specifically enforced. (*Parker v. Taswell*, 2 De G. & J. 559; 27 L. J., Ch. 812; *Drury v. Macnamara*, 5 E. & B. 616; 25 L. J., Q. B. 5.)

Void leases
construed as
agreements;

Moreover, if a tenant entered under a void lease, or an agreement for a lease, he formerly became at law tenant from year to year upon all the terms of the lease which were not inconsistent with such a tenancy (*Martin v. Smith*, L. R., 9 Ex. 50; 43 L. J., Ex. 42; *ante*, pp. 8, 74), with an equitable right to a lease in the terms of the agreement. And a Court of Equity, regarding that as done which ought to be done, treated a tenant in possession under an instrument which would be specifically enforced as in the same position as if a valid lease were in existence. Since the passing of the Judicature Acts there is but one Court, and the rules of equity prevail in it, and the tenant in possession, if his document of tenancy is one which would be specifically enforced (*Coatsworth v. Johnson*, 55 L. J., Q. B. 220), is in the same position as if an actual lease in the terms of the agreement had been granted to him. (*Walsh v. Lonsdale*, 21 Ch. D. 9; 52 L. J., Ch. 2; *Re Maughan*, 14 Q. B. D. 956; 54 L. J., Q. B. 128; *All-*

and both
after entry as
leases.

husen v. Brooking, 26 Ch. D. 559; 53 L. J., Ch. 520; *Re Northumberland Avenue Hotel Co., Sully's Case*, 54 L. T. 76.)

When a tenancy is actually created by entry on the land and payment of rent, the terms of the tenancy may be proved by oral testimony. And a document read over at the treaty for the taking may be used by a witness to refresh his memory as to the stipulations. (*Bolton v. Tomlin*, 5 A. & E. 856; *Doe v. Raffan*, 6 Esp. 4; *Tomlinson v. Day*, 2 B. & B. 680.) It cannot, however, be used in evidence without a stamp. (*Chadwick v. Clarke*, 14 L. J., C. P. 233; 1 C. B. 700; but see *Doe v. Pedgriph*, 4 C. & P. 312; *Drant v. Brown*, 3 B. & C. 665; *Clay v. Crofts*, 20 L. J., Ex. 361.)

We now propose to consider the essentials of a valid agreement for a lease, and the rights of the parties thereunder.

(a.) *Essentials of a complete and valid Agreement.*

All agreements for leases to be in writing.

By sect. 4 of the Statute of Frauds (29 Car. 2, c. 3), it is provided, "that no action shall be brought to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement or some memorandum or note thereof shall be in writing signed by the party to be charged, or some other person thereunto by him lawfully authorized." This includes all *agreements* for leases of any "interest in lands or hereditaments"; and for however short a period the interest may be, the agreement concerning it must be in writing; so that, although a *lease* not exceeding three years (from the making thereof) may be an oral one, an agreement for such a lease must be in writing. (*Edge v. Strafford*, 1 Tyr. 295.)

Though for a term of less than three years.

What is a contract for an interest in land.

In addition to the ordinary contract to grant or take a lease or tenancy of a house or land, or to assign a tenancy (*Buttemere v. Hayes*, 5 M. & W. 456), any contract for the exclusive possession of a specific part of a house or premises, as the ordinary contract for lodgings, is within the statute (*Inman v. Stamp*, 1 Stark. 12; *Edge v. Strafford*, *supra*); but a contract for a mere licence or permission to reside in or use certain premises, not involving the exclusive possession of any part, such as a contract for board and lodging in the house of another, is not within the statute. (*Wright v. Stavert*, 2 E. & E. 721; 29 L. J., Q. B. 161.) Neither is an agreement for the use of a graving dock

under certain rules and regulations for the repair of a ship. (*Wells v. Kingston-upon-Hull*, L. R., 10 C. P. 402; 44 L. J., C. P. 257.) A contract to procure for a person the assignment of a lease is within the statute, although the contractor has no interest in the lease. (*Horsey v. Graham*, L. R., 5 C. P. 9; 39 L. J., C. P. 58; and see *Foster v. Wheeler*, 38 Ch. D. 130; 57 L. J., Ch. 871.) So is an agreement to assign rent not yet due (*Ex parte Hall, Re Whitting*, 27 W. R. 385; 40 L. T. 179; 48 L. J., Bkey. 79); a contract to surrender a tenancy to the landlord and prevail upon him to accept another as his tenant (*Cocking v. Ward*, 1 C. B. 858; 15 L. J., C. P. 245); a contract to quit possession of a house in favour of another (*Kelly v. Webster*, 12 C. B. 283; 21 L. J., C. P. 163), and an agreement to give a right both to shoot game and to take away a share of the game shot. (*Webber v. Lee*, 51 L. J., Q. B. 485; 9 Q. B. D. 315.)

A contract which comprises several matters, some within the statute and some not, and which does not satisfy the requirements of the statute, is not enforceable, even as to so much as is not within the statute. Thus, where upon a verbal letting of a house and furniture, the landlord promised to send in more furniture, it was held to be one contract, and that no action would lie for not sending in the furniture (*Mechelen v. Wallace*, 7 A. & E. 49); and in the case of a verbal agreement for a tenancy of a house, the landlord undertaking to make certain alterations, for which as well as for the furniture and fixtures the tenant was to pay, it was held that no action could be maintained for the furniture and costs of alterations. (*Vaughan v. Hancock*, 3 C. B. 766; 16 L. J., C. P. 1.) So, where land was let on lease, together with the crops and tillages, but the latter were to be paid for at a valuation, it was held that they nevertheless passed with the land, and that the whole contract was within the statute, and must be in writing. (*Earl of Falmouth v. Thomas*, 1 Cr. & M. 89.)

The statute does not make the contract void, but only not enforceable by action, unless there is a memorandum in writing to satisfy its requirements. (*Maddison v. Alderson*, 8 App. Ca. 467, *per* Lord Blackburn.)

A memorandum to satisfy the statute must be in existence at the time the action upon it is commenced (*Lucas v. Dixon*, 22 Q. B. D. 357; 58 L. J., Q. B. 161); must be a memorandum of a contract then in existence,

Agreement
must ascer-
tain all the
essential
terms, viz.:
(1) Parties.

and not of an expected future contract (*Mundy v. Asprey*, 13 Ch. D. 855; 49 L. J., Ch. 216); and must contain, either expressly or by reference to other documents, all the terms, or provide the compulsory means of determining all the terms, of the contract between the parties, thus:—

(1)—It must specify both the lessor and the lessee (*Warner v. Willington*, 25 L. J., Ch. 662; 3 Drew. 523; *Williams v. Jordan*, 6 Ch. D. 517; 46 L. J., Ch. 681), either by name (*Williams v. Lake*, 29 L. J., Q. B. 1), or by some description or reference which sufficiently points out the person referred to—all that is required being identification. (*Catling v. King*, 5 Ch. D. 660; 46 L. J., Ch. 384.) Thus, “proprietor,” “owner,” “mortgagee,” “trustee under a trust for sale,” is a sufficient description of the lessor, although he is not named; but “vendor,” “lessor,” “client,” or “friend” of a named agent is not sufficient. (*Jarrett v. Hunter*, 34 Ch. D. 182; 56 L. J., Ch. 141; *Sale v. Lambert*, 43 L. J., Ch. 470; L. R., 18 Eq. 1; *Potter v. Duffield*, 43 L. J., Ch. 472; *Commings v. Scott*, L. R., 20 Eq. 11; 44 L. J., Ch. 563; *Thomas v. Brown*, 45 L. J., Q. B. 811; 1 Q. B. D. 714; *Rossiter v. Miller*, 3 App. Ca. 1124; 48 L. J., Ch. 10; *Catling v. King*, 46 L. J., Ch. 384; 5 Ch. D. 660; *Donnison v. People’s Café Co.*, 45 L. T. 187; *Lavery v. Pursell*, 39 Ch. D. 508; 57 L. J., Ch. 570; *Coombs v. Wilkes*, [1891] 3 Ch. 77; 61 L. J., Ch. 42.) It is sufficient if the name occurs only in the signature. (*Stokell v. Niven*, 61 L. T. 18.)

(2) The
property.

(2)—It must describe the property to be leased (*Lancaster v. De Trafford*, 31 L. J., Ch. 554); but a very general description is ordinarily sufficient (*Murray v. Spicer*, L. R., 5 Eq. 527; 37 L. J., Ch. 505), as “my house” (*Cowley v. Watts*, 17 Jur. 172); the “property in Cable Street” (*Bleakley v. Smith*, 11 Sim. 150); “the house in Newport” (*Owen v. Thomas*, 3 My. & K. 353); or the like. (1 Dart, V. & P. 254.) The use of the words “*et cetera*” should be avoided as ambiguous (*Price v. Griffith*, 1 De G., M. & G. 80; *Naylor v. Goodall*, 47 L. J., Ch. 53; 26 W. R. 162); and “the property” was held an insufficient description of colliery plant and stock (*Vale of Neath Colliery Co. v. Furness*, 45 L. J., Ch. 276); though it would be sufficient if parol evidence could be produced to show what property was intended. (*Shardlow v. Cotterill*, 20 Ch. D. 137; 51 L. J., Ch. 353.)

(3) The term.

(3)—It must state the length of the proposed lease. (*Fitzmaurice v. Bayley*, 9 H. L. Ca. 78; 27 L. J., Q. B.

143; *Clinan v. Cooke*, 1 Sch. & Lef. 22; *Gordon v. Trevelyan*, 1 Price, 64; *Cox v. Middleton*, 23 L. J., Ch. 618; *Dolling v. Evans*, 36 L. J., Ch. 474.) But an agreement for a lease “for seven, fourteen, or — years” was held to entitle the tenant to a lease for fourteen years, determinable at his option at the end of seven years. (*Powell v. Smith*, L. R., 14 Eq. 85; 41 L. J., Ch. 734.) An agreement for the purchase of a lease, which does not mention the length of the term granted by the lease, is void for uncertainty (*Southern v. Harriman*, 14 W. R. 487), *a fortiori* when the purchase is to be carried out by an underlease which does not mention the term to be underleased. (*Dolling v. Evans*, *supra*.)

(4)—It must state the day on which the term is to commence. (*Blore v. Sutton*, 3 Mer. 237; *Nesham v. Selby*, 41 L. J., Ch. 173; *Ib.* 551; L. R., 7 Ch. 406; *Hersey v. Giblett*, 23 L. J., Ch. 818; *Davis v. Jones*, 25 L. J., C. P. 91; *Cartwright v. Miller*, 36 L. T., N. S. 398.) In *Jaques v. Millar* (47 L. J., Ch. 544; 25 W. R. 846; 6 Ch. D. 153), where the date of commencement was not stated, it was held to commence from the date of the agreement. But this case was overruled by *Marshall v. Berridge* (19 Ch. D. 233; 51 L. J., Ch. 329; Fry, 172), and it is now settled that in the case of an executory agreement to grant a lease, the mere fact of the agreement being dated does not show from what date the term is to run (*Ib.*; *Rock Portland Co. v. Wilson*, 52 L. J., Ch. 214; 31 W. R. 193; *Wyse v. Russell* (1882), 11 L. R., Ir. 173; *White v. M^h Mahon* (1886), 18 L. R., Ir. 460); but it is sufficient if it appears either in express terms, or by reference to some writing which would make it certain, or by reasonable inference from the language used, on what date the term is to commence. (*Marshall v. Berridge*, *supra*, per Lush, L. J.; *Phelan v. Tedcastle* (1885), 15 L. R., Ir. 169, per Sullivan, L. C.) Thus, where a landlord was proceeding by ejectment against the tenant in possession of property an offer made by another person to become tenant thereof, adding, “and I propose taking possession of the said premises immediately after the execution of the *habere* in the said ejectment,” was held to sufficiently indicate the commencement of the term. (*Phelan v. Tedcastle*, *supra*.) And under an agreement, dated the 1st of April, for a lease, possession to be given “within one month from this date,” for a term of three years, the date on which possession was given

(4) Commencement of term.

within the month (of which evidence was admitted), was held to be the date from which the lease was to commence. (*Re Lander and Bagley's Contract*, [1892] 3 Ch. 41.) An agreement to grant to a tenant in possession an "extension of lease" for a given term, entitles him to a lease commencing on the expiration of the existing term. (*Verlander v. Codd*, T. & R. 352.) And where a lessee wrote to his landlord's agent asking for an extension of his term for twenty-one years from the termination of his present lease, a subsequent communication from the latter that the landlord was willing to grant a lease for twenty-one years was held to be sufficiently connected with the original application, and to fix the date of commencement as the expiration of the old lease. (*Wood v. Aylward*, 58 L. T. 662.) Where the agreement fixed the day from which rent was to be payable, the term was held to commence on that day. (*Wesley v. Walker*, 26 W. R. 368; 38 L. T. 284.) And an agreement between A. and B., that on paying 20*l.* B. was to get possession of a farm of land and also a lease for twenty-one years, was held clearly to indicate that the term was to commence on payment of the 20*l.* (*Erskine v. Armstrong* (1887), 20 L. R., Ir. 296.)

(5) The rent.
Agreement
not neces-
sarily in one
document.

(5)—And it must specify the amount of rent to be paid. It is not necessary that the agreement should be a formal instrument, or be contained in a single paper. It may be contained in a letter or a correspondence (*Kennedy v. Lee*, 3 Mer. 441; *Cayley v. Walpole*, 39 L. J., Ch. 609), or even in a receipt for consideration money. (*Dolling v. Evans*, 36 L. J., Ch. 474; *Wesley v. Walker*, *supra*; *Evans v. Prothero*, 21 L. J., Ch. 772; *Shardlow v. Cotterill*, 20 Ch. D. 137; 51 L. J., Ch. 353.) Any number of documents, written or printed, provided they contain in themselves clear reference to each other, may be used to evidence the agreement. (*Warner v. Willington*, 25 L. J., Ch. 662; *Baumann v. James*, L. R., 3 Ch. 508; 16 W. R. 877; *Pierce v. Corf*, L. R., 9 Q. B. 210; 22 W. R. 293; *Dobell v. Hutchinson*, 3 A. & E. 355; *Clinan v. Cooke*, 1 Sch. & Lef. 22; *Nene Valley Drainage Co. v. Dunkley*, 4 Ch. D. 1.) There need not be an express reference from one document to another. (*Wylson v. Dunn*, 34 Ch. D. 569; 56 L. J., Ch. 855.) But they must on the face of them be connected with each other, either by specific reference (*Rishton v. Whatmore*, 8 Ch. D. 467; 47 L. J., Ch. 629; *Williams v. Jordan*, 6 Ch. D. 517; 46 L. J., Ch. 681), or by necessary

or reasonable intendment. (*Long v. Millar*, 4 C. P. D. 450; 48 L. J., Q. B. 596; *Ridgway v. Wharton*, 6 H. L. C. 238; 27 L. J., Ch. 46; *Taylor v. Smith*, 67 L. T. 39.) Parol evidence cannot be given to show that two or more documents relate to the same transaction; but where one document refers to other documents by a vague description, parol evidence may be given to identify the documents referred to. (*Owen v. Thomas*, 3 My. & K. 353; *Naylor v. Goodall*, 37 L. T., N. S. 422.) In other words, it may be given to earmark or identify something referred to in the documents which, when identified, makes the written documents capable of being read together. (*Long v. Millar*, *supra*, per Thesiger, L. J.; *Roots v. Snelling*, 48 L. T. 216; *Studds v. Watson*, 28 Ch. D. 305; 52 L. T. 129; 54 L. J., Ch. 626; *Oliver v. Hunting*, 44 Ch. D. 205; 59 L. J., Ch. 255.) Thus, in *Ridgway v. Wharton* (*supra*), where an agreement to grant a lease did not contain all the terms, but referred to "instructions," parol evidence was held admissible to show that the instructions were in writing, and that the document containing them was the thing referred to. In *Long v. Millar* (*supra*), a receipt expressed to be for the "deposit on the purchase of three plots of land at H.," was held a sufficient reference to a prior agreement to purchase, and evidence was admitted to show that the agreement was in writing, and to identify the paper containing it. A reference to "our arrangement as to the hiring of your carriage" was held a sufficient reference to the writing containing the arrangement (*Care v. Hastings*, 50 L. J., Q. B. 575; 7 Q. B. D. 125); and "I accept your offer" is sufficient to admit evidence of the terms of a written offer. (*Long v. Millar*, *supra*, per Bramwell, L. J.) Where there was an offer to grant a lease for fourteen years "at the rent and terms agreed on," parol evidence was admitted to show the existence of and identify a previous written document containing all the terms except the length of the lease. (*Baumann v. James*, L. R., 3 Ch. 508; 16 W. R. 877.)

A letter, containing the terms of the agreement, written to an agent or other third party (*Gibson v. Holland*, L. R., 1 C. P. 1; 35 L. J., C. P. 5; *Wood v. Aylward*, 58 L. T. 662), or written to the other party to repudiate the contract upon insufficient grounds (*Bailey v. Sweeting*, 9 C. B., N. S. 843; 30 L. J., C. P. 150; and see *Buxton v. Rust*, L. R., 7 Ex. 279), the minutes of a limited company containing the

terms of an agreement and signed by the chairman (*Jones v. Victoria, &c. Dock Co.*, 46 L. J., Q. B. 219; 2 Q. B. D. 314), or indeed any other writing by which a party *admits* an agreement and the terms thereof will be sufficient. (*Hammersley v. De Biel*, 12 Cl. & F. 45.) But a refusal to carry out "the agreement to grant a lease which your client alleges he (the other party) has entered into" is not sufficient. (*Jackson v. Oglander*, 2 H. & M. 465; 13 W. R. 936.) A solicitor of one party, without express authority to conclude an agreement, has no power to make a binding admission of the terms of an agreement. (*Smith v. Webster*, 45 L. J., Ch. 528; 3 Ch. D. 49.)

Distinction
between a
treaty and a
concluded
agreement.

When an agreement is to be made out from a correspondence, it must be clear, taking the whole together, that there is a concluded assent to all the terms, and not a mere treaty or conditional assent. (*May v. Thomson*, 20 Ch. D. 705; 51 L. J., Ch. 917; *Wood v. Silcock*, 32 W. R. 845; 50 L. T. 251; *Donnison v. People's Café Co.*, 45 L. T. 187.) A proposal met with a simple and unqualified acceptance will be sufficient (*Gretton v. Mees*, 7 Ch. D. 839; 26 W. R. 607); but if the proposal is met by a counter proposal, or is accepted subject to some new terms, or is otherwise qualified, this operates as a rejection of the original offer, which at once ceases to be binding notwithstanding the other party afterwards tenders an acceptance of it, and there will be no agreement until both parties have clearly assented to one and the same set of terms. (*Nesham v. Selby*, L. R., 7 Ch. 406; 41 L. J., Ch. 551; *Cartwright v. Miller*, 36 L. T. 398; *Cowley v. Watts*, 17 Jur. 172; *Watts v. Ainsworth*, 1 H. & C. 83; 31 L. J., Ex. 448; *Routledge v. Grant*, 4 Bing. 653; *Hussey v. Horne-Payne*, 8 Ch. D. 670; 4 App. Cas. 311; 47 L. J., Ch. 751; 48 L. J., Ch. 846.) To ascertain whether or not the correspondence amounts to a complete and final assent we must look at the whole from beginning to end (*May v. Thomson*, *supra*, per Lindley, L. J.), and a correspondence which would be final, if it had stopped at a certain point, may, by subsequent letters, show that the parties have not agreed as to all the terms. (*Hussey v. Horne-Payne*, *supra*; *Williams v. Brisco*, 22 Ch. D. 441; 48 L. T. 198.) In the case of *Bolton Partners v. Lambert* (37 W. R. 434; 41 Ch. D. 295; 58 L. J., Ch. 425), the Court of Appeal held that where there had been by means of letters an offer and acceptance constituting a completed contract, the fact that

the party seeking specific performance had, in letters subsequent to those constituting the contract, sought to insert a new stipulation, did not deprive the earlier letters of their character of a complete contract. This case was regarded by Kay, J., in *Bristol, &c. Aerated Bread Co. v. Maggs* (44 Ch. D. 616; 59 L. J., Ch. 472; and see *Bellamy v. Debenham*, [1891] 1 Ch. 412), as in conflict with the earlier authorities.

If the acceptance of an offer is subject to certain conditions, specified or to be specified by the party himself or his solicitor, then, until those conditions are accepted, there is no final agreement. (*Crossley v. Maycock*, L. R., 18 Eq. 180; 43 L. J., Ch. 379.) The point most frequently arises where there is a reference to a future formal instrument. If in any informal documents the parties have assented conclusively and finally to the same terms, a mere provision that they shall be embodied in a more formal or detailed instrument will not prevent their operating as a concluded agreement. (*Ib.*; *Bolton Partners v. Lambert*, *supra*; *Ridgway v. Wharton*, 6 H. L. Ca. 238; 27 L. J., Ch. 46; *Cayley v. Walpole*, 39 L. J., Ch. 609; *Rossiter v. Miller*, 48 L. J., Ch. 10; 26 W. R. 865 (H. L.); *Lewis v. Brass*, 26 W. R. 152; 37 L. T. 738.)

Conditional
assent.

But if an offer is accepted *subject to* the preparation of a formal agreement, there is no contract until the formal agreement is signed. (*Bolton Partners v. Lambert*, 41 Ch. D. 303; *per* Cotton, L. J.; *Honeyman v. Marryat*, 6 H. L. Ca. 112; 26 L. J., Ch. 619; *Chinnock v. Marchioness of Ely*, 4 De G., J. & S. 638; 34 L. J., Ch. 399; *Winn v. Bull*, 7 Ch. D. 29; 47 L. J., Ch. 139; *Harvey v. Barnard's Inn*, 50 L. J., Ch. 750; 45 L. T. 280; *Goodall v. Harding*, 52 L. T. 126; *Bushell v. Pocock*, 53 L. T. 860; *Hawkesworth v. Chaffey*, 55 L. J., Ch. 335; 54 L. T. 72.) And it is not necessary the words "subject to" should be used, if it is clear that the signature to a more formal agreement is a term of the assent (*Crossley v. Maycock*, L. R., 18 Eq. 180); thus, "I accept your offer; I will send draft contract in due course." (*Vale of Neath Colliery Co. v. Furness*, 45 L. J., Ch. 276; *Goodall v. Harding*, 52 L. T. 126.) This is particularly the case where it is obvious the formal contract is to supply material terms not yet agreed upon (*Donnison v. People's Café Co.*, 45 L. T. 187); or the correspondence has been between agents settling the terms of a formal contract intended to be signed by

their principals. (*Bushell v. Pocock, supra.*) Where all the necessary terms had been assented to, an agreement was held to be final, notwithstanding a stipulation for "a proper lease to be drawn up with all proper clauses and approved of by me" (*Eadie v. Addison*, 52 L. J., Ch. 80; 31 W. R. 320); and an unqualified acceptance of terms, with the addition, "I shall be there to sign the contract at 11 o'clock," was held not to attach punctual attendance as a condition. (*Branson v. Stammers*, 28 W. R. 180; 41 L. T. 434.) But a contract to take a lease on terms mentioned, "provided the terms of the draft lease are reasonable in our estimation," was held to be conditional and not final (*Wilcox v. Redhead*, 49 L. J., Ch. 539; 28 W. R. 795); and so was a contract subject to the approval of the title by the purchaser's solicitor. (*Hudson v. Buck*, 7 Ch. D. 683; 47 L. J., Ch. 247; but see *Hussey v. Horne-Payne*, 4 App. Ca. 311, *per* Cairns, L. C.) Where A. and B. agree that A. shall grant a lease to the nominee of B., the contract is not enforceable until B. has made his nomination, and the nominee has agreed to accept the lease. (*Williams v. Brisco*, 22 Ch. D. 441; 48 L. T. 198.) Where all the terms are assented to subject to a condition, the contract upon the performance of that condition becomes absolute. (*Bonnewell v. Jenkins*, 8 Ch. D. 70; 47 L. J., Ch. 758.) But there must be a final assent to all the terms (*Stanley v. Doudeswell*, L. R., 10 C. P. 102; 23 W. R. 389), and nothing to manifest that the writings contain only part of the terms, and that the parties have left something to be determined by future agreement. (*Holland v. Eyre*, 2 Sim. & St. 194; *English Credit Co. v. Arduin*, 40 L. J., Ex. 108; *Bertel v. Neveux*, 39 L. T. 257.)

Continuance
of offer.

An offer which in express terms limits the time for its acceptance comes to an end at the expiration of the time named; an offer not expressly limited in continuance ceases if not accepted within a reasonable time. (Leake, 40 *et seq.*) An offer is put an end to by a direct refusal of it, or by an indirect refusal in the shape of a proposed variation of terms not assented to by the other side. (Dart, 267.) It is revoked by the death or bankruptcy of the person who makes the offer. (*Meynell v. Surtees*, 25 L. J., Ch. 257). A proposal may be withdrawn or varied at any time before it is accepted, even although a time be named for its acceptance, which time has not expired.

(*Dickinson v. Dodds*, 45 L. J., Ch. 777; 2 Ch. D. 463; *Graham v. Campbell*, 7 Ch. D. 490; 47 L. J., Ch. 593.) But an offer is treated as made continuously until it be brought to the knowledge of the person to whom it has been made that it is withdrawn. (*Henthorn v. Fraser*, 66 L. T. 439; [1892] 2 Ch. 27; 61 L. J., Ch. 373; *Byrne v. Van Tienhoven*, 5 C. P. D. 344; *Stevenson v. McLean*, 5 Q. B. D. 346; 49 L. J., Q. B. 701; but see *Quenerduaine v. Cole*, 32 W. R. 185.) Formal notice of withdrawal is not, however, necessary; it is sufficient if the person to whom it is made has actual knowledge that the person who has made it has done some act inconsistent with the continuance of the offer. (*Dickinson v. Dodds*, *supra*.)

It is sufficient if the agreement be signed by the party against whom it is sought to be enforced, or his agent. It need not be signed by the other party. (*Boys v. Ayerst*, 6 Madd. 323; *Laythoarp v. Bryant*, 2 Bing. N. C. 735; *Warner v. Willington*, 25 L. J., Ch. 662; *Reuss v. Picksley*, L. R., 1 Ex. 342; 35 L. J., Ex. 218.) But it seems that if the party who has not signed it refuses, when called upon, to do so, the other party may treat this as a repudiation of the contract. (Sugden, V. & P. 104, 13th ed.) If the agreement is in duplicate, and the two copies differ, it is sufficient that the one signed by the defendant contains all the essentials. (*Butcher v. Nash*, W. N. (1889) 116; but see *Smith v. Wheatcroft*, 9 Ch. D. 223; 47 L. J., Ch. 745.)

Signed by the party to be charged.

As to signature, all that is necessary is that a person should, by writing his name, or other equivalent act, testify that he has entered into the contract. (*Propert v. Parker*, 1 Russ. & M. 625; *Jones v. Victoria, &c. Dock Co.*, 2 Q. B. D. 314; 46 L. J., Q. B. 219.) Thus, writing at the head of the document, "I, J. C., agree" (*Knight v. Crockford*, 1 Esp. 190), "J. B. agrees" (*Bleakley v. Smith*, 11 Sim. 150), or "Mr. W. P. has agreed" (*Propert v. Parker*, *supra*), would be sufficient. It must, however, be introduced into the document in such a manner as to govern and authenticate the whole instrument (*Ogilvie v. Foljambe*, 3 Mer. 53; *Caton v. Caton*, L. R., 2 H. L. 127; 36 L. J., Ch. 886; *Kronheim v. Johnson*, 7 Ch. D. 60; 47 L. J., Ch. 132); provided it have that effect, it is immaterial whether it is at the beginning, in the middle, or at the end. If there be an apparent intention to sign at the foot of the instrument, as by using the words "as

How signed.

witness our hands," there is no signing unless the names be subscribed. (*Hubert v. Treherne*, 3 M. & Gr. 743.) A man may sign by stamping his name (*Bennett v. Brumfitt*, L. R. 3 C. P. 28; 37 L. J., C. P. 25), or by using his initials (Sug. V. & P. 144, 14th ed.), or by recognizing and adopting his name printed at the head of a memorandum (*Touret v. Cripps*, 48 L. J., Ch. 567; 27 W. R. 706), or a bill of parcels (*Schneider v. Norris*, 2 M. & S. 286); or by adopting a previous signature, as by altering or assenting to an alteration made after signature. (*Hudson v. Stuart*, 22 W. R. 534; *Bluck v. Gompertz*, 7 Ex. 862.) A document containing the name of the party to be charged, and presented by him or his agent to the other party for signature, is sufficiently signed by the party to be charged. (*Evans v. Hoare*, [1892] 1 Q. B. 593; 61 L. J., Q. B. 470.) Thus, a document in the form of a letter and commencing with the defendants' name (as being addressed to them), and submitted by their agent to the plaintiff for signature by him, was held to be sufficiently signed. (*Ib.*) Signed instructions to a telegram would be sufficient (*Godwin v. Francis*, L. R. 5 C. P. 295; 39 L. J., C. P. 121), but a signature to a letter, which referred to and accompanied an engrossment containing a recital of the contract, was held not sufficient. (*Mundy v. Asprey*, 49 L. J., Ch. 216; 13 Ch. D. 855.) But where a plaintiff sent a draft to the defendant's solicitor, which the latter returned approved, and afterwards the defendant wrote complaining that the lease had not been engrossed, it was held, that the defendant's letter contained a sufficient reference to the draft to enable the two to be read together to satisfy the statute. (*Craig v. Elliott*, 15 L. R., Ir. 257.) The signature may be in ink or in lead. (*Geary v. Physic*, 5 B. & C. 234.)

Agent need not be appointed by writing.

If an agreement be signed by an agent, he need not be authorized to do so by writing (*Heard v. Pilley*, L. R., 4 Ch. 548; *Cave v. Mackenzie*, 46 L. J., Ch. 564); but he must, in fact, have the authority of his principal to sign a binding contract (*Vale of Neath Colliery Co. v. Furness*, 45 L. J., Ch. 276; 24 W. R. 631; *Smith v. Webster*, 3 Ch. D. 49; 45 L. J., Ch. 528; *Forster v. Rowland*, 7 H. & N. 103; 30 L. J., Ex. 396), of which the onus of proof would lie upon a plaintiff relying upon the authority. (*Davis v. Coles*, 85 L. T. Jour. 229; *Saunders v. Dence*, 52 L. T. 644.) And a house agent, with instructions merely to find

a tenant for property, would not be impliedly authorized to enter into a binding agreement with a person willing to become tenant. (*Hamer v. Sharp*, L. R., 19 Eq. 108; 44 L. J., Ch. 53; *Wilde v. Watson*, 1 L. R. Ir. 402; *Prior v. Moore*, 3 Times L. R. 624; *Chadburn v. Moore*, 67 L. T. 257.)

The authority of the agent may be shown by the subsequent recognition and adoption by the principal of his acts. (*Bolton Partners v. Lambert*, 41 Ch. D. 295; 58 L. J., Ch. 425.) The rule as to ratification by a principal of acts done by an assumed agent is, that the ratification is thrown back to the date of the act done, and that the agent is put in the same position as if he had authority to do the act at the time it was done by him. (*Ib.*, per Cotton, L. J.; *Re Portuguese Consolidated Copper Mines, Ex parte Badman*, 45 Ch. D. 16; see Fry, 711.)

Ratification
of agent's
acts.

When in the course of negotiations a misrepresentation is made by an agent, the principal is responsible for the misrepresentation if it is within the scope of the agent's authority. If a man employs an agent to let a house, the employment implies an authority to describe the property truly, to represent its actual situation, and, if the agent thinks fit, its value. (*Mullens v. Miller*, 52 L. J., Ch. 380; 22 Ch. D. 194; *Ludgater v. Lore*, 44 L. T. 694.)

Misrepresen-
tation by
agent.

It often happens during the treaty for, and before a formal lease or agreement is drawn up, that certain matters are agreed upon which are not afterwards embodied in the formal instrument, and a question arises whether they can be enforced by the one party against the other. The test would seem to be, first, whether the alleged agreement is concerning "an interest in lands or tenements," and if not, then, secondly, whether it amounts to a variation of the terms of the written agreement, or forms an independent collateral contract. In the latter case it may be supported, though not in writing. (*Lindley v. Lacey*, 17 C. B., N. S. 578; 34 L. J., C. P. 7.) Thus, where a tenant entered on land on the understanding that a lease should be executed at a future time, and when the lease was presented he refused to sign unless the landlord would agree to destroy the rabbits. The landlord then verbally consented, and the tenant signed the lease, which contained a clause by which the tenant agreed not to shoot, hunt, sport, or destroy any game, but to use his best endeavours for the preservation of the same. In an action by the

Oral agree-
ment colla-
teral to one
in writing
supported.

tenant upon the landlord's verbal agreement to destroy the rabbits, it was held that this agreement, though oral, was binding, since it was collateral to, and did not alter or vary, the written contract. (*Morgan v. Griffith*, L. R., 6 Ex. 70; 40 L. J., Ex. 46; *Erskine v. Adeane*, 42 L. J., Ch. 849; L. R., 8 Ch. 756.) So, where a lessor promised that if the proposed lessee would take the lease of a house, he would complete the house and, amongst other things, construct a water-closet, it was held that the promise to complete the house and construct the closet was a distinct collateral contract not required to be in writing. (*Mann v. Nunn*, 43 L. J., C. P. 241; but the case has been questioned, 32 L. T. 320.) And where, upon the negotiation for a tenancy of a house and furniture, the landlord agreed to do repairs and send in more furniture, it was held, on demurrer, that this was a collateral agreement not required to be in writing. (*Angell v. Duke*, L. R., 10 Q. B. 174; 44 L. J., Q. B. 78; approved *Carter v. Salmon*, 43 L. T. 490.) But evidence cannot be given to set up a prior parol agreement in lieu of a written one; and upon the trial of *Angell v. Duke* (*supra*) it appeared that after the promise by the landlord the plaintiff had entered into a written agreement to take the house and the specified furniture in the house, and it was held that evidence of the previous parol promise was inadmissible as being an attempt to add an additional term to the written contract. (*Angell v. Duke*, 32 L. T., N. S. 320; L. R., 10 Q. B. 174; *Carter v. Salmon*, 43 L. T. 490; *Burtsal v. Bianchi*, 65 L. T. 678.)

Though evidence may not be given to vary the terms of a written contract, evidence may be given to show that it was not the intention of the parties that the writing should operate as a contract. (*Rogers v. Hadley*, 32 L. J., Ex. 241; *Pym v. Campbell*, 25 L. J., Q. B. 277; *Clever v. Kirkman*, 24 W. R. 159; 33 L. T. 672; *M'Collin v. Gilpin*, 29 W. R. 408; 44 L. T. 914.)

The manner in which a collateral agreement may be used in answer to a claim for specific performance will be hereafter noticed.

How far lease
supersedes
agreement for
a lease.

Where there has been a written agreement for a lease, followed by an actual lease, the rights of the parties must be governed wholly by the deed as to so much of the contract as the deed deals with. (*Leggott v. Barret*, 15 Ch. D. 306; *Wheeldon v. Burrows*, 12 Ch. D. 31; 48 L. J.,

Ch. 853.) If the agreement also contain stipulations as to collateral matters which are not dealt with by the lease, the agreement may be looked at to ascertain the rights of the parties (*Salaman v. Glover*, L. R., 20 Eq. 444; 44 L. J., Ch. 551; *Palmer v. Johnson*, 53 L. J., Q. B. 348; 13 Q. B. D. 351); unless it be shown that the lease was in pursuance of a new parol agreement varying the terms of the original writing. (*Sanderson v. Grates*, 23 W. R. 797.)

(b.) *Right to investigate Lessor's Title.*

But for the provisions of the Acts next hereinafter considered, a person who had agreed to grant a lease would have been bound to make out and verify his title in the same way as if he had agreed to sell the fee simple. (*Jones v. Watts*, 43 Ch. D. 574, *per* Lindley, L. J.)

Former right to investigate title.

However, by the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 2, it is provided that "under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title of the freehold." This did not prevent the grantee or purchaser of an underlease calling for the title of his immediate lessor. But by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 3, subs. (1), a purchaser of an underlease is precluded from calling for the title of the leasehold reversion; and by sect. 13, on a contract for a sub-demise, the title to the leasehold reversion cannot be required without express stipulation. The Act still leaves a sub-tenant liable to produce his own lease to his intending lessee. (*Gosling v. Woolf*, 41 W. R. 106; [1893] 1 Q. B. 39.) It is not quite clear what the expression "to call for the title" means. It obviously exempts the lessor from furnishing an abstract or producing his deeds, but it does not prevent the lessee from showing *aliunde* that the title is bad. (*Jones v. Watts*, *supra*.) In an action for specific performance of an agreement to accept a lease, if the defendant raises a definite objection to the title, which the Court can deal with, he will have the usual right of a litigant to production of documents in the possession of the lessor relative to that issue; but he gets no such right from a mere denial of the plaintiff's title or vague general

V. & P. Act, 1874.

allegations of the existence of restrictive covenants. (*Jones v. Watts, supra.*)

The statutory restriction against calling for the title of the lessor does not relieve the lessee from constructive notice of anything which he could have discovered had he examined the title. The position of the lessee is, in fact, the same as if, under the previous law, he had expressly stipulated not to call for the title. (*Patman v. Harland*, 17 Ch. D. 353; 50 L. J., Ch. 642.) Therefore, in any case in which the intended lessee proposes to expend money in improvements or building, it is imprudent to take a lease without investigating the lessor's title (see *Besley v. Besley*, 9 Ch. D. 103; 38 L. T. 844; *Clayton v. Leech*, 41 Ch. D. 103); for he is bound by all the infirmities of the title of his lessor, notwithstanding he may have been excluded by statute or express condition from investigating it. (*Patman v. Harland, supra*; *Thorneycell v. Johnson*, 50 L. J., Ch. 641; 29 W. R. 677; *Porter v. Drew*, 5 C. P. D. 143; 49 L. J., C. P. 482; *Mogridge v. Clapp*, 40 W. R. 663; [1892] 3 Ch. 382.)

(c.) *Form of Lease pursuant to Agreement—"Usual Covenants."*

"Usual"
covenants.

Agreements for leases are often very concise and informal documents, and it is frequently an important question, what terms the parties really have attached to their relationship of landlord and tenant. Thus it is often agreed that a lease shall contain "all usual covenants and clauses," and, indeed, a bare contract for a lease imports that there should be proper covenants, and, according to Lord Eldon, the law implies what they are. (*Church v. Brown*, 15 Ves. 265; *Propert v. Parker*, 3 My. & K. 280; and see *per Jessel, M. R., Hampshire v. Wickens*, 47 L. J., Ch. 243; 7 Ch. D. 555.) It has, however, often been treated as a question of fact properly left to a jury to say what covenants are "usual" (*Bennett v. Womack*, 3 C. & P. 96); and was so left in the later case of *Brookes v. Drysdale* (3 C. P. D. 52; 26 W. R. 331). It is submitted that the true distinction is, that the covenants mentioned below as usual and proper in any lease would be so regarded as matter of law; and that other covenants claimed to be usual from custom, particular trade, or other circumstances, would be a question of fact for a jury.

Covenants by the lessee for payment of rent (*Taylor v. Horde*, 1 Burr. 60, 125); for payment of such taxes as are not expressly payable by the landlord (5 Dav. Conv. 51, 3rd ed.); to keep the premises in repair (*Doe v. Withers*, 2 B. & Ad. 903); to give them up in that condition at the expiration or determination of the term; to permit the lessor to enter and view the state of repairs (*Blakesley v. Wheldon*, 1 Hare, 181); to cultivate lands according to the approved rules of husbandry; and a covenant by the lessor for quiet enjoyment as against himself and those claiming through him (*Hall v. City of London Brewery Co.*, 31 L. J., Q. B. 257), may be treated as usual and proper covenants in any lease. (*Hampshire v. Wickens*, 7 Ch. D. 555; 47 L. J., Ch. 243.) Custom and the particular circumstances may render other covenants proper, but they cannot be considered as usual ones in a legal sense. Thus, in an agreement for a lease to contain "all covenants usual and ordinary in farming leases," the local custom in respect of such leases may be looked to (*Bell v. Barchard*, 21 L. J., Ch. 411; 16 Beav. 8), or previous leases between the same parties.

What are
"usual."

In ascertaining what are usual covenants, clauses, and provisoes, it must be borne in mind that the fact of a covenant or proviso being usually inserted in leases of a similar kind will not bring it within the legal acceptance of the term "usual." (5 Dav. Conv. 51, 3rd ed.) Thus, where there was an agreement for a lease to contain "usual and customary mining clauses:" it was held to mean not usual clauses in a mining lease, but usual clauses for carrying on mining operations. (*Hodgkinson v. Crowe*, 44 L. J., Ch. 238; L. R., 19 Eq. 591.)

In the absence of an express stipulation, the Court, under an agreement for "usual and customary clauses," will only allow to be inserted in the lease a proviso for re-entry on non-payment of rent, and not a general proviso for re-entry on breach of any covenant, although the latter may be usually inserted in similar leases in the locality. (*Hodgkinson v. Crowe*, 44 L. J., Ch. 680; L. R., 10 Ch. 622; *Re Anderton and Milner's Contract*, 45 Ch. D. 476; 59 L. J., Ch. 765; *Re Lander and Bagley's Contract*, [1892] 3 Ch. 41.)

Proviso for
re-entry.

Clauses as to forfeiture on bankruptcy, and in restraint of assignment without licence, are not usual (*Henderson v.*

Covenants
against
alienation.

Hay, 3 Bro. C. C. 632; *Jones v. Jones*, 12 Ves. 186; *Hampshire v. Wickens*, 47 L. J., Ch. 243; 7 Ch. D. 555; *Hyde v. Warden*, 3 Ex. D. 72; 47 L. J., Ex. 121; *Eadie v. Addison*, 52 L. J., Ch. 80; 31 W. R. 320; *Church v. Brown*, 15 Ves. 258; *Buckland v. Papillon*, L. R., 2 Ch. 67; 36 L. J., Ch. 81; *Bishop v. Taylor*, 39 W. R. 542; 60 L. J., Q. B. 556); even in a mining district where such clauses are customary (*Hodgkinson v. Crowe*, L. R., 19 Eq. 591; 44 L. J., Ch. 238); or in a lease of a public-house. (*Re Lander and Bagley's Contract*, [1892] 3 Ch. 41.) Neither is a proviso that underleases, assignments, and evidence of devolutions of the premises shall be left with the solicitor of the lessor within two calendar months from the date thereof for registration, and a fee paid for registration, "common and usual" in leases of public-houses. (*Brookes v. Drysdale*, 3 C. P. D. 52; 26 W. R. 331.) Such provisos are, however, common in leases in the county of Middlesex,—a fact to be borne in mind in dealing with property so situate.

In a lease of a mine in Derbyshire, a proviso, that when the mines demised are incapable of being worked to a profit the lessee shall be entitled to determine the lease, is not usual. (*Strelley v. Pearson*, 15 Ch. D. 113; 49 L. J., Ch. 406.)

In restraint
of trade.

Covenants in restraint of trade in a trading district (*Wilbraham v. Livesey*, 18 Beav. 206), or restraining the lessee from carrying on a particular trade without the licence of the lessor, are not "usual" (*Propert v. Parker*, 3 My. & K. 280); and an agreement that a house shall not be converted into a school will not authorize a restriction against the carrying on of other trades. (*Van v. Corpe*, 3 My. & K. 269.) Neither will an agreement not to carry on any but a given trade authorize the insertion of affirmative covenants to carry on that trade. (*Doe v. Guest*, 15 M. & W. 160.)

To restore in
case of de-
struction.

It is not a usual proviso that if the premises demised be blown down or burned by accidental fire, the lessor shall repair or rebuild, or in default the lessee shall be at liberty to quit the premises, and be forthwith discharged from payment of rent. (*Doe v. Sandham*, 1 T. R. 705; *Thorpe v. Milligan*, 5 W. R. 336.) And upon an agreement "for usual and necessary covenants and provisos, and particularly a covenant on the part of the lessee to keep the premises in good tenantable repair," it was held that he

was not entitled to introduce into the covenant the words "damages by fire or tempest only excepted." (*Sharp v. Milligan*, 23 Beav. 419.) Even where the lessor consents to the covenant to repair being qualified by excepting damage by fire, the lessee is not entitled to the further qualification of "or other casualty." (*Crosse v. Morgan*, 37 W. R. 543; 60 L. T. 703.)

Upon the letting of a public-house a covenant that the tenant shall do no act whereby the licence shall become forfeited, is not an implied, and therefore not a usual, covenant (*Maw v. Hindmarsh*, 28 L. T., N. S. 644); neither is a covenant that the lessee shall reside on the premises, and personally conduct the business. (*Re Lander and Bagley's Contract*, [1892] 3 Ch. 41.) And where a lease of a public-house contained covenants by the lessee to keep up the licence, and after its expiration the lessor agreed to grant a new lease to contain covenants "similar to" those of the former lease, under which agreement the lessee retained possession and suffered a forfeiture of his licence; the lessor having sought specific performance, it was held, that he was not entitled to insert a covenant to keep up the licence, but only a covenant that the lessee would use his best endeavours to obtain a licence, and, if obtained, would keep up the same, in the terms of the old covenant. (*Shepherd v. Walker*, 34 L. T., N. S. 230.)

Covenants as to management of public-houses.

The only safe course is to set out verbatim in an agreement the covenants intended to be inserted in the lease; for otherwise questions in respect of "usual" clauses will arise upon an attempt to enforce specific performance of the agreement, or in any legal proceedings in respect of the duties and liabilities of the parties thereunder.

The Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 28), s. 9, provides that a vendor or a purchaser of real or leasehold estate may apply in a summary way to a judge in chambers in respect of any question arising out of the contract (not being a question affecting its validity or existence). Under this provision a summons may be taken out to settle questions arising between a lessor and lessee out of the contract to grant a lease (*Re Stephenson and Cox*, 36 Sol. J. 287); such as to the form of the lease to be granted (*Re Anderton and Milner's Contract*, 45 Ch. D. 476; 59 L. J., Ch. 765; *Re Lander and Bagley's Contract*, [1892] 3 Ch. 41), or the like.

Summons under V. & P. Act, 1874, to decide questions under contract.

(d) *Action for Specific Performance.*

Remedies for breach of contract.

Assuming the existence of a valid contract for a lease, of which the written evidence satisfies the Statute of Frauds, the remedy of either party for non-fulfilment of its terms by the other party is either an action for specific performance or for damages or for both.

When specific performance granted.

Where such a contract has been entered into by competent parties, and is unobjectionable in its nature and circumstances, specific performance is as much a matter of course, and therefore of right, as are damages. (*Hall v. Warren*, 9 Ves. 605; Fry, 19.) The jurisdiction in specific performance exists:—1st. Where damages will not afford an adequate compensation for the non-performance of the contract (*Harnett v. Yeilding*, 2 Sch. & Lef. 553; *Davis v. Hone*, *ibid.* 341; *Ryan v. Mutual Tontine, &c. Association*, [1893] 1 Ch. 116, *per* Kay, L. J.); and 2nd. Where the lessor is unable to perform his part of the contract literally, although he is able to perform it substantially; or, not being able to perform it substantially, the lessee is willing to take what he can get. In the last-mentioned class of cases the Court exercises its jurisdiction to grant specific performance with compensation in respect of the difference between the actual and expressed subject-matter of the contract. (Fry, 22, 518.)

Jurisdiction discretionary.

The exercise of the jurisdiction in specific performance is in the discretion of the Court; not an arbitrary or capricious discretion, but one to be governed, as far as possible, by fixed rules and principles. (*Lamare v. Dixon*, L. R., 6 H. L. 414; 43 L. J., Ch. 203; *Haywood v. Cope*, 27 L. J., Ch. 468.) Accordingly, on the ground that the remedy in damages is adequate, performance will not be enforced of an agreement for a lease from year to year (*Clayton v. Illingworth*, 10 Hare, 451); nor where the term agreed upon has expired, or will expire, before a decree can be obtained. (*Nesbit v. Meyer*, 1 Swanst. 226; *Walters v. Northern Coal Co.*, 25 L. J., Ch. 633, 638; 5 De G., M. & G. 629; *De Brassac v. Martyn*, 11 W. R. 1020.)

Performance of agreement after acts which would work a forfeiture of the lease.

The rule of the Court is to refuse specific performance where the judgment would be inoperative (*Gregory v. Wilson*, 9 Hare, 683); for instance, where the lease, if granted, might at once be determined under the proviso for re-entry for breach of a covenant to repair (*ibid.*; *Nunn*

v. *Truscott*, 3 De G. & S. 304; *Swain v. Ayres*, 21 Q. B. D. 289; 57 L. J., Q. B. 428), to cultivate in a husbandlike manner (*Coatsworth v. Johnson*, 55 L. J., Q. B. 220), or to insure (*Thompson v. Guyon*, 5 Sim. 65), or for breach of any other covenant which must of necessity be introduced into the lease. (*Jones v. Jones*, 12 Ves. 188; *Lewis v. Bond*, 18 Beav. 85.) Even where the lease, if executed, would contain no proviso for re-entry, or only a proviso for re-entry on non-payment of rent (*ante*, p. 129), yet where acts of waste which would work a forfeiture, or breaches of covenant which could not be compensated by damages, have been committed, specific performance would be refused. (*Gourlay v. Duke of Somerset*, 1 V. & B. 68; *Hare v. Burges*, 5 W. R. 585.) It is said that in order that such breaches may be a bar to specific performance they must be gross and wilful. (*Parker v. Taswell*, 2 De G. & J. 573.) The meaning of the expression is not clear (Fry, 442), and at all events a breach would be regarded as "gross and wilful" if not attributable to mistake or accident. (*Gregory v. Wilson*, 9 Hare, 689.)

The above rule was not affected by sect. 14 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), under which if the lease had actually been granted, the Court could have relieved against the forfeiture. The section deals in terms only with forfeiture "under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease." It has been held that "lease" does not include an agreement for a lease. (*Coatsworth v. Johnson*, 54 L. T. 520; *Swain v. Ayres*, 20 Q. B. D. 585.) And, according to the later view of the Court of Appeal, it does not include an agreement for a lease unless the agreement is one of which a Court of Equity *would* have granted specific performance altogether apart from the provisions of sect. 14. (*Swain v. Ayres*, 21 Q. B. D. 289; 57 L. J., Q. B. 428.) Applying that decision affirmatively, Kekewich, J., held that where, notwithstanding breaches of covenant, there was a right to specific performance of an agreement for a lease independently of the section, the tenant might have performance upon making compensation according to the section. (*Strong v. Stringer*, 61 L. T. 470.) The matter has been further dealt with by the Conveyancing Act, 1892 (55 & 56 Vict. c. 13), s. 5, which enacts that in sect. 14 of the Act of 1881, "lease" shall also include an agreement for a lease where the

How such agreements affected by Conveyancing Acts.

lessee has become entitled to have his lease granted. It is not quite clear whether this part of the section is merely declaratory of the law, as laid down in *Sicain v. Ayres*, or was intended to include an agreement for a lease where the lessee would, *but for the breach complained of*, have become entitled to have his lease granted.

Formerly, when it was doubtful whether or not there had been a breach of the covenants which ought to be introduced into the lease, the Court decreed specific performance, and directed the lease to bear the date of the agreement, giving the lessor the opportunity to bring an ejectment in respect of the breaches. (*Pain v. Coombs*, 1 De G. & J. 34; *Lillie v. Legh*, 3 De G. & J. 204; *Poynts v. Fortune*, 27 Beav. 393; *Rankin v. Lay*, 29 L. J., Ch. 734.) But now the whole matter will be disposed of in one action.

Of oral agreements after part performance.

Even where there has been only an oral agreement for a lease, it may be enforced specifically where there has been a sufficient part performance of the contract to take it out of the operation of the Statute of Frauds, and the terms of the agreement can be distinctly shown. (*Lester v. Foxcroft*, 1 Wh. & Tu. L. C. 828.) The doctrine of part performance applies to all cases in which a Court of Equity would grant specific performance if the alleged agreement had been in writing. (*McManus v. Cooke*, 35 Ch. D. 681; 56 L. J., Ch. 662; Fry, 276.) To amount to part performance, an act must be unequivocally referable to the agreement (*Morphett v. Jones*, 1 Swanst. 181; *Maddison v. Alderson*, 8 App. Cas. 467; 52 L. J., Q. B. 737), and such as to raise an inference of some agreement, and then parol evidence is admitted to show what the agreement was. (*Frame v. Dawson*, 14 Ves. 386.)

Acts of part performance:
(1) Possession taken and expenditure.

Thus, where a person enters into possession under a parol agreement, and with unequivocal reference to such agreement (*Morphett v. Jones*, *supra*; *Ungley v. Ungley*, 5 Ch. D. 887; 46 L. J., Ch. 854; *Bowers v. Cator*, 4 Ves. 91); *à fortiori*, where such person has, upon the faith of the agreement, and with the landlord's acquiescence, expended money in building, or other improvements (*Gregory v. Mighell*, 18 Ves. 328; *Sutherland v. Briggs*, 1 Hare, 26; *Mundy v. Jolliffe*, 5 My. & C. 167; *Shillibeer v. Jarvis*, 8 De G., M. & G. 79), or otherwise acted in reliance on and in execution of the agreement, so that non-performance would be a fraud upon him (*Phillips v.*

Alderton, 24 W. R. 8), specific performance will be enforced (*per* Lord Kingsdown, *Ramsden v. Dyson*, L. R., 1 H. L. 170; *Bankart v. Tennant*, 39 L. J., Ch. 809; *Lindsay v. Lynch*, 2 Sch. & Lef. 1; *Plimmer v. Mayor of Wellington*, 51 L. T. 475; 9 App. Ca. 699); and possession and a special expenditure by the tenant on the faith of a parol agreement for a lease was held sufficient to entitle him to specific performance, although the agreement was altogether denied by the landlord. (*Farrall v. Darenport*, 3 Giff. 363.) And so, where there has been such an expenditure or possession given, the Court will decree specific performance of an agreement by a corporation which is not under the corporate seal. (*Crook v. Seaford*, L. R., 6 Ch. 551; *Wilson v. West Hartlepool Rail. Co.*, 34 L. J., Ch. 241.) But it is essential that the possession should be given according to the contract, and not obtained wrongfully. (*Cole v. White*, cited 1 Bro. C. C. 409.)

Payment of consideration money is not an act of part performance (*Clinan v. Cooke*, 1 Sch. & Lef. 40; *Humphreys v. Green*, 10 Q. B. D. 148; 52 L. J., Q. B. 140; *Maddison v. Alderson*, 8 App. Cas. 467); neither are payments introductory to an agreement, such as making a survey, valuation, or appraisement, or preparing an instrument of demise. Ordinarily, when the tenant is in possession at the date of the parol agreement, merely continuing in possession does not of itself amount to part performance. (*Morphett v. Jones*, 1 Swanst. 181; *Wills v. Stradling*, 3 Ves. 378; *Brady's case*, 15 W. R. 753; but see *Dowell v. Dew*, 1 Y. & C. C. C. 345.) He must do some act purporting to be in pursuance of the new contract. Thus, payment by a lessee in possession of an increased rent (*Nunn v. Fabian*, L. R., 1 Ch. 35; 35 L. J., Ch. 140); and expenditure of money by the lessee, or an intending sublessee by his authority, in repairing the buildings (*Mundy v. Jolliffe*, 5 My. & C. 167; *Williams v. Evans*, L. R., 19 Eq. 547; 44 L. J., Ch. 319), in accordance with the terms of the agreement for a further lease, have been held to amount to acts of part performance. But merely doing acts which the lessee would be liable to do if there were no agreement does not amount to part performance. (See *Frame v. Dawson*, 14 Ves. 386.)

(2) Payments.

(3) Remaining in possession.

In all cases it must be shown plainly and distinctly what the terms of the agreement are, and that the acts done are referable to that agreement alone. (*Per* Lord

Romilly, *Price v. Salusbury*, 32 L. J., Ch. 447; *Faulkner v. Llewellyn*, 31 L. J., Ch. 549.) Where possession has been given on the faith of an agreement, it is the duty of the Court, as far as it is possible to do so, to ascertain the terms of the agreement and give effect to it. (*Wilson v. West Hartlepool Rail. Co.*, 34 L. J., Ch. 249, *per* Turner, L. J.)

Specific performance with compensation.

Where the landlord is able to perform his contract in substance, but unable to perform it literally in all its parts, he may maintain an action for specific performance, making compensation for the portion of the contract which he is unable to perform. But where he is unable to perform his contract substantially, as for example, if he has not substantially the whole interest he has contracted to demise, he cannot enforce the contract against the tenant; yet the tenant can insist on a lease of so much as the landlord can demise, with compensation for the difference in the shape of a diminution of rent. (*Burrow v. Scammell*, 19 Ch. D. 175; 51 L. J., Ch. 296; *McKensie v. Hesketh*, 7 Ch. D. 675; 47 L. J., Ch. 231; Fry, 548.)

Specific performance of part of a contract.

It is not the practice of the Court to enforce part of an agreement which cannot be enforced in its entirety. (*Ogden v. Fossick*, 4 De G. F. & J. 426; 32 L. J., Ch. 73; *Merchants' Trading Co. v. Banner*, L. R., 12 Eq. 18; 40 L. J., Ch. 515; *Ryan v. Mutual Tontine, &c. Association*, [1893] 1 Ch. 116.) And, inasmuch as the Court cannot enforce a contract for personal service, specific performance was refused of an agreement to grant a lease of a wharf, one of the terms of which was that the lessee should employ the lessor as manager at the wharf. (*Ogden v. Fossick*, *supra*.)

Where, however, the contract, though contained in one document, consists of separable and independent parts, the execution of one part may be ordered although the remainder is incapable of being enforced or may not have been performed. (*Ogden v. Fossick*, *supra*; *Wilkinson v. Clements*, L. R., 8 Ch. 96; 42 L. J., Ch. 38; *Green v. Low*, 22 Beav. 625.) Thus, where by a building agreement the landlord agreed to grant separate leases of successive plots of land when the houses, or each of them, should be built to a certain stage, it was held that the contract was separable and could be separately enforced as to some plots, notwithstanding the agreement remained unperformed as to the other plots. (*Wilkinson v. Clements*,

supra; *Louther v. Heaver*, 41 Ch. D. 248; 58 L. J., Ch. 482.)

To the rule that the Court will not enforce part of an entire contract there are two exceptions, viz.:—first, where the thing which the Court cannot enforce is unimportant and non-essential (*Middleton v. Greenwood*, 2 De G. J. & S. 142; *Richardson v. Smith*, L. R., 5 Ch. 648; 39 L. J., Ch. 877); and, secondly, where it is a condition inserted for the plaintiff's benefit in respect of which the defendant is in default and the plaintiff is willing to waive the condition, in which case the Court may grant specific performance of the rest of the contract, and damages for non-performance of the condition. (21 & 22 Vict. c. 27; and although the statute is repealed, the jurisdiction conferred by it remains: *Sayers v. Collyer*, 28 Ch. D. 103; 54 L. J., Ch. 1.) Thus, where the plaintiff has agreed to grant a lease, and the defendant to accept such lease and build on or repair the premises, the plaintiff may, even at the trial, waive the contract to build and have damages for the breach thereof, and specific performance of the contract to accept the lease. (*Soames v. Edge*, Johns. 669; *Mayor of London v. Southgate*, 38 L. J., Ch. 141; 17 W. R. 197; *Kay v. Johnson*, 2 H. & M. 118.) But the plaintiff cannot have specific performance of an agreement for a lease subject to a condition which (without any default of the other contracting party) has become impossible, without waiving both the performance of the condition and the claim for damages. Therefore, where a landlord had agreed to grant a lease and to do such repairs as the parties should mutually arrange, but died before the nature and extent of the repairs had been arranged, though no suggestion was made that he evaded an arrangement, the Court declined either to determine what repairs ought to be done or grant damages for their non-execution (*Norris v. Jackson*, 1 J. & H. 319, Wood, V.-C.), but granted specific performance of the agreement for a lease. (*Ibid.*, 3 Giff. 396, Stuart, V.-C.)

The combined operation of Lord Cairns' Act (21 & 22 Vict. c. 27) and the Judicature Act is that, in an action for specific performance, the Court may give—1st, damages, either in addition to or in substitution for specific performance where there is a case for specific performance; or 2nd, damages as at common law where there is no case for specific performance. (*Elmore v. Pirrie*, 57 L. T. 333;

Specific performance with damages.

Fry, 585.) But damages in the former case will only be granted where the plaintiff has a case for specific performance when he issues his writ (*White v. Bobby*, 26 W. R. 133; *Lavery v. Pursell*, 39 Ch. D. 508; 57 L. J., Ch. 570), and in the latter case, only where there is a complete contract upon which, before the Judicature Act, damages might have been recovered. Thus, damages will not be given in the case of an oral agreement which at the hearing has become incapable of specific performance, notwithstanding there may have been part performance. (*Re Northumberland Avenue Hotel Co.*, 54 L. T. 76; affirmed 33 Ch. D. 16; *Lavery v. Pursell*, *supra*.) The measure of damages in any case is the same as would have been given at common law in an action for breach of the contract. (*Rock Portland Cement Co. v. Wilson*, 31 W. R. 193.)

Although a plaintiff may claim both specific performance and damages in the same action, he cannot maintain an action for specific performance after he has recovered damages in an independent action. (*Sainter v. Ferguson*, 1 M. & G. 286.)

Execution of
lease, how
enforced.

When, in an action for specific performance, a person had been directed to execute a lease, but refused to do so, the Court could formerly only enforce the order for its execution by attachment, the Trustee Act, 1850, not applying to such a case. (*Grace v. Baynton*, 25 W. R. 506; but see *Hall v. Hale*, 51 L. T. 226.) Now, under 47 & 48 Vict. c. 61, s. 14, where any person neglects or refuses to execute a document, the Court may order it to be executed by a person nominated by the Court for that purpose. (*Owen v. Edwards*, 33 W. R. 578.)

Parties to an
action for
specific per-
formance.

The parties to the agreement, or their representatives in interest, are necessary and sufficient parties to an action for specific performance. A remainderman would be considered the representative of a tenant for life who had entered into a contract within his statutory or settlement powers. (*Shannon v. Bradstreet*, 1 Sch. & L. 52, 65.) Strangers to the contract, though necessary parties to the lease, ought not to be made parties. Thus, the mortgagee of the reversion (subsequent to an agreement for a lease), who did not dispute the right to a lease, was held to be improperly joined. (*Long v. Bowring*, 33 Beav. 585; 12 W. R. 972.)

Specific per-
formance
against

Where a person who has agreed to accept a lease or a renewed lease dies, his executors may be compelled to take

a lease, the covenants being so framed that the executors shall be no further liable thereon than they would have been on the covenants which ought to have been entered into by the testator. (*Phillips v. Everard*, 5 Sim. 102; *Stephens v. Hotham*, 1 K. & J. 571; 24 L. J., Ch. 665.) And so in any case in which specific performance is sought against persons in a fiduciary capacity, they covenant only so as to bind the property, not themselves personally; but if they seek to enforce performance they must bind themselves personally.

executor of
proposed
lessee.

In addition to the defences arising under the Statute of Frauds and the other matters already considered, the specific performance of a contract may be resisted on the following amongst other grounds, viz. :—(1) the incapacity of one or both of the contracting parties; (2) the nature of the contract, as that it is incomplete, conditional, ambiguous, contradictory or uncertain, illegal, amounts to a breach of trust or of a previous contract with a third person, or is harsh, unreasonable, or unfair, or the like; (3) the inability of plaintiff or defendant to perform his part of the contract; (4) matters attending the inception of the agreement, such as fraud, misrepresentation, or mistake, or the existence of an inconsistent cotemporaneous parol agreement; and (5) the conduct of the parties subsequent to the contract, such as waiver or abandonment, and laches or delay.

DEFENCES:

The personal incapacity of either party to a contract is a defence to a claim against that party for specific performance, and, on the ground of the mutuality required in equity, is also a defence for the other party. Thus, an infant can neither sue nor be sued for specific performance. (*Flight v. Bolland*, 4 Russ. 298.) The contract made with a lunatic cannot be enforced unless made during a lucid interval. (*Hall v. Warren*, 9 Ves. 605.)

Incapacity to
contract.

An imperfect or incomplete contract will not be enforced. Where it is of the essence of the agreement that one or more of its terms should be ascertained in a specified manner, the agreement is incomplete until this is done. (*Milnes v. Gery*, 14 Ves. 400.) Thus, specific performance at the suit of the lessor was refused of an agreement to grant a lease so soon as the lessee should have built a house of a given value "according to a plan to be submitted to and approved by the lessor," which house the lessee agreed to build and to accept a lease of, but no plan had been sub-

Nature of the
contract.

Incomplete-
ness.

mitted or approved. (*Brace v. Wehnert*, 25 Beav. 348; 27 L. J., Ch. 572; *Norris v. Jackson*, 1 J. & H. 319; but see *Mayor of London v. Southgate*, 38 L. J., Ch. 141.) And so performance was refused of a "preliminary" building agreement intended to be supplemented by particulars and plans, to be agreed upon by the parties, of the kind of houses to be erected. (*Wood v. Silcock*, 50 L. T. 251.) An agreement was held incomplete which did not state from what time an increased rent was to be paid. (*Lord Ormond v. Anderson*, 2 Ball & B. 363.) So was an agreement for a lease for lives which neither named the lives or the person by whom they were to be named. (*Wheeler v. D'Esterre*, 2 Dow, 359; but see *Fitzgerald v. Vicars*, 2 D. & Wal. 298.)

Conditional.

The right to enforce an agreement may be lost by the plaintiff having failed in the observance of some stipulation, express or implied, upon the faith of which the defendant entered into the agreement. (*Finch v. Underwood*, 2 Ch. D. 310; 45 L. J., Ch. 522; *Williams v. Brisco*, 22 Ch. D. 441; 48 L. T. 198; *Lord Ranelagh v. Melton*, 13 W. R. 150.) But the non-performance must be of an essential and important part of the contract (Fry, 431), otherwise the plaintiff's breach of duty may be adequately met by damages. (*Oxford v. Procan*, L. R., 2 P. C. 135; *Hembrow v. Talbot*, 36 Sol. J. 712.)

Thus, specific performance was refused of an agreement to accept a lease of a public-house, where the condition was that the plaintiff should obtain for the defendant a retail licence for the premises, and the licence, when obtained, was fettered with a proviso that spirits should not be drunk on the premises (*Modlen v. Snowball*, 10 W. R. 24; 31 L. J., Ch. 44); and so where the condition (implied) was that the landlord should complete the building of an unfinished house and give possession thereof to the defendant on a given date in a tenantable state of repair; but the house, when possession was offered, was so defectively constructed as to expose the defendant to the risk of an excessive annual expenditure, under his repairing covenants, to maintain and repair it. (*Tildesley v. Clarkson*, 31 L. J., Ch. 362; 30 Beav. 419; 10 W. R. 328.) But specific performance was granted where the condition was that a house should be completed by a given date in a proper and satisfactory manner, and the defects were trifling and could be remedied by the expenditure of 35*l.*, which was awarded to the de-

fendant as compensation. (*Hembrow v. Talbot*, *supra*.) Where there was an agreement for a lease of a house "when complete, finished, and fit for habitation," and the defendant having taken possession and occupied afterwards resisted specific performance, making various objections as to the unfitness of the house, which were referred by the Court to an expert, who reported that, although serious objections existed, the house was "complete, finished, and fit for habitation," the Court acted upon his report. (*Faulkner v. Lleucllin*, 11 W. R. 1055; 12 W. R. 193.) The performance of a condition may be waived or the defence lost by delay in repudiating the agreement. But it must be delay under such circumstances as to raise the presumption of acquiescence in the non-fulfilment of the stipulation. Thus, where a tenant, relying upon the landlord's promise to construct certain cellars, which would make the premises suitable for the tenant's business of a wine merchant, signed an agreement for a lease and went into possession and occupation for two years, but while in occupation, from time to time called upon the landlord to fulfil the promise, and always paid his rent under protest; it was held, that there was no acquiescence so as to prevent his setting up the non-fulfilment of the plaintiff's promise as a defence to a claim for specific performance. (*Lamare v. Dixon*, L. R., 6 H. L. 414; 43 L. J., Ch. 203.)

A contract for a lease which is expressly conditional on the lessor being able to grant it, cannot be enforced by either party without showing that the lessor has a legal title enabling him to grant the lease. (*Abbot v. Blair*, 8 W. R. 672; *Bauman v. Matthews*, 4 L. T., N. S. 783.)

Discrepancy (*Callaghan v. Callaghan*, 8 Cl. & F. 374), or ambiguity, or want of reasonable certainty (*Rummens v. Robins*, 3 De G., J. & S. 88; 13 W. R. 979; *Bernard v. Meara*, 12 Ir. Ch. R. 389), in the terms of a contract, is ground for refusing to enforce it. For the Court will refuse its aid when it is doubtful whether the defendant meant to contract to the extent to which he is sought to be charged. (*Harnett v. Yeilding*, 2 Sch. & L. 554.) Specific performance was refused, on the ground of uncertainty, of an agreement for a mineral lease which did not clearly define the area to be comprised in the lease (*Lancaster v. De Trafford*, 31 L. J., Ch. 554); of an agreement to take a house, "if put into thorough repair and the drawing rooms handsomely decorated according to the

Ambiguity or uncertainty.

present style; paint required both inside and out, although perhaps for some parts one coat would be sufficient" (*Taylor v. Portington*, 7 De G., M. & G. 328—it will be observed that the contract was conditional, see *Dear v. Verity*, 38 L. J., Ch. 487); of an agreement that a considerable sum should be laid out in repairs (*Gardner v. Fooks*, 15 W. R. 388); and of an agreement for a lease "agreeably to our covenants," there being a conflict as to what those covenants were. (*Jeffery v. Stephens*, 8 W. R. 427.) On the other hand, where there was an agreement to let a house, and a stipulation that the lessor should put it into "substantial and decorative repair," the Court granted specific performance at the suit of the lessee, with an inquiry whether the repairs had been properly executed, and if not, then an award of damages (*Samuda v. Lawford*, 4 Giff. 42); and an agreement to grant a lease under which the lessee was "to do all the painting, papering, repairing, decorating, &c., during the term," was enforced at the instance of the lessee. (*Dear v. Verity*, 38 L. J., Ch. 297, 486.) Although the use of the words "*et cetera*" will often make a contract ambiguous (*Price v. Griffith*, 1 De G., M. & G. 80), they do not necessarily import uncertainty, as they may be sufficiently understood by reference to the words to which they are added and surrounding facts. (*Powell v. Loregrove*, 8 De G., M. & G. 357; *Parker v. Taswell*, 27 L. J., Ch. 812; 2 De G. & J. 559.) Where by an agreement for a lease the tenant was to do certain specified repairs and other works upon the property at a total estimated expenditure of 150*l.*, and the specified works would evidently cost nearly that sum, the Court considered the "other works" to be of such a trifling description that their being left undefined was not a ground for refusing specific performance. (*Baumann v. James*, L. R., 3 Ch. 508.)

Where the agreement is uncertain as to the subject-matter, it may sometimes be rendered certain by the election of the person who under the contract has to do the first act. (*Rumble v. Heygate*, 18 W. R. 749.) Thus, under a contract to let a glebe, "except thirty-seven acres," it was held that the right of election was with the lessor, as he had the first act to do. (*Jenkins v. Green*, 27 Beav. 437; 28 L. J., Ch. 817; but see *Pearce v. Watts*, L. R., 20 Eq. 492; 44 L. J., Ch. 492.)

Illegality.

An agreement in furtherance of a purpose which is

illegal or against public policy will not be enforced (*Sykes v. Beadon*, 11 Ch. D. 170; 48 L. J., Ch. 522); even if the illegality be doubtful. (*Johnson v. Shrewsbury, &c. Rail. Co.*, 3 De G., M. & G. 914, 923; but see *Aubin v. Holt*, 2 K. & J. 70; 25 L. J., Ch. 36.) It would be a good defence, therefore, that the premises are intended to be used for a purpose forbidden by law (*Cowan v. Milbourn*, L. R., 2 Ex. 230; 36 L. J., Ex. 124; *Gaslight and Coke Co. v. Turner*, 6 Bing. N. C. 324); or for an immoral purpose. (*Smith v. White*, L. R., 1 Eq. 626; 35 L. J., Ch. 454.)

On grounds somewhat related to those lastly considered, a contract will not be enforced when the performance would amount to a breach of trust (*Oceanic Steam Navigation Co. v. Sutherland*, 16 Ch. D. 236; 50 L. J., Ch. 308), as where trustees have entered into a contract for a lease, or a renewal of a lease, which is in excess of their powers. (*Harnett v. Yeilding*, 2 Sch. & L. 549; *Bellringer v. Blagrove*, 1 De G. & S. 63.) But a covenant for the renewal of a lease is good if the lease would satisfy the power when the time for granting it arrives. (*Gaslight and Coke Co. v. Towse*, 35 Ch. D. 519; 56 L. T. 602.) And if a trustee has power to grant a lease, say, for ten years, it does not appear to make any difference whether in form he grant a lease for three years with an option to renew for another seven, or a lease for ten years with an option to determine at the end of the first seven. (*Re Lander and Bagley's Contract*, [1892] 3 Ch. 41, *per Chitty, J.*)

Breach of trust.

A contract will not be enforced which would involve a breach of an earlier contract with a third person. (*Willmott v. Barber*, 15 Ch. D. 96; 43 L. T. 95.) Thus, where A., who held under a lease from B., with a covenant not to assign or underlet without B.'s consent, agreed to underlet part of the property to C., with the option of purchasing the whole within five years, and B. refused his consent, it was held that C. was not entitled to specific performance, as that would involve a breach of A.'s covenant with B. (*Ib.*)

Breach of contract with a third person.

The Court will not enforce the performance of a contract which is unreasonable, or would impose great hardship on the defendant (*Talbot v. Ford*, 13 Sim. 173; *Dean of Ely v. Stewart*, 2 Atk. 44); unless the hardship arises out of circumstances subsequent to the contract. (*Evans v.*

Hardship.

Walshe, 2 Sch. & L. 519.) Thus, an intending lessor will not be compelled to give effect to his agreement when it can only be done by paying off a mortgage on the premises (*Costigan v. Hastler*, 2 Sch. & L. 160); or by litigation (*Acraman v. Price*, 18 W. R. 540; 19 W. R. 364); but the lessee will be left to his remedy in damages. (*Howe v. Hunt*, 31 Beav. 420; 32 L. J., Ch. 36.) So, where forfeiture would result on the enforcement of the contract. But it must clearly appear that forfeiture will follow upon the performance of the agreement being ordered; and even then, if the danger of forfeiture arise out of the defendant's own acts subsequent to the contract, the Court will grant specific performance, and leave the defendant to the consequence. (*Helling v. Lumley*, 3 De G. & J. 493; 28 L. J., Ch. 249.)

Inability of
plaintiff to
perform
contract.

Defective
title.

It is a defence to an action that the plaintiff is unable to perform in its integrity his part of the contract which he seeks to enforce. Therefore, a lessor whose title is defective cannot enforce specific performance of the agreement (*Fildes v. Hooker*, 2 Mer. 424), even with an indemnity against the defect. (*Ib.*; 3 Madd. 193; *Hanbury v. Litchfield*, 2 My. & K. 632.) Nor is it material that the defect in title was not the original ground for refusing to accept the lease. (*Baskcomb v. Phillips*, 29 L. J., Ch. 380.) It is a defect in title that the ground landlord's licence (which is refused or not obtained) is essential to a valid lease. (*Forrer v. Nash*, 35 Beav. 167; 14 W. R. 8.)

• Insolvency of
plaintiff-
lessee.

When the intending lessee is the plaintiff, proof of general insolvency showing him not to be in a position to perform the covenants in the lease is a defence to the action. (*Neale v. Mackenzie*, 1 Keen, 474.) But it is no defence to a claim by an assignee of an agreement that the party with whom the landlord contracted has become insolvent, provided the assignee is solvent and there is no evidence that the contract was entered into upon considerations personal to the assignor. (*Crosbie v. Tooke*, 1 My. & K. 431; *Morgan v. Rhodes*, *ib.* 435.)

Bankruptcy.

Specific performance will not be granted at the instance of a bankrupt lessee, nor of his trustee, unless the latter will enter personally into the covenants the bankrupt should have entered into. (*Powell v. Lloyd*, 2 Y. & J. 372.) Specific performance of an agreement for a lease cannot be enforced against a trustee in bankruptcy without his consent (*Holloway v. York*, 25 W. R. 627); but under sect. 55

of the Bankruptcy Act, 1883, he may be compelled to elect whether or not he will disclaim the agreement.

The Court never orders a defendant to perform in specie an impossibility. (*Green v. Smith*, 1 Atk. 573; *Asylum for Female Orphans v. Waterlow*, 16 W. R. 1102.) Therefore it is a defence to a claim for specific performance (but not to a claim for damages) against an intending lessee that he cannot grant the proposed lease without the consent (which cannot be obtained) of a third person, such as a mortgagor or mortgagee (*Franklin v. Ball*, 33 Beav. 560), or superior landlord. (*Lehmann v. McArthur*, L. R., 3 Ch. 496; *Hilton v. Tipper*, 16 W. R. 888.) But where the consent of a superior landlord may be obtained on payment of a reasonable sum of money the agreement will be enforced. (*Hilton v. Tipper*, *supra*; 18 L. T. 626. As to payments the landlord can now exact, see 55 & 56 Vict. c. 13, s. 3.) Under an agreement to obtain the consent or pay a sum by way of liquidated damages the defendant cannot refuse to apply for the consent and escape specific performance by paying the stipulated amount. (*Long v. Bowring*, 33 Beav. 585.)

Inability of defendant to perform contract.

The defendant cannot be compelled to execute a lease to property to which his title is defective (*Bauman v. Matthews*, 4 L. T., N. S. 783), unless the plaintiff is willing to accept such title as the defendant can give. (*Harnett v. Yeilding*, 2 Sch. & L. 554.) We have pointed out that where the defendant can grant a valid lease of part only of the premises, the plaintiff may accept a lease of such part with a proportionate abatement of rent (*ante*, p. 136). And it appears that a copyholder contracting to grant a lease for a longer term than the custom allows would be compelled to effectuate his contract in substance by from time to time executing leases for such terms as he could until he had made up the term contracted for (*Paxton v. Newton*, 2 Sm. & G. 437); and, generally, when the defendant has contracted beyond his power or estate the Court will order him to grant a lease for such term as is within his power. (*Cleaton v. Gower*, Finch, 164; *Dale v. Lister*, 16 Ves. 7.)

Defences based on importing into a contract something cotemporaneous with its creation which is not found in the document itself are of two classes. "One set of cases is this: where there is a clear and distinct agreement, and a defence is made that the agreement ought not to be

Matters attending the inception of the agreement.

performed because of some collateral circumstance which shows fraud [or misrepresentation], or mistake, or surprise. . . . The other, where by parol evidence it is sought to prove that the agreement in writing is not the real agreement between the parties, or, in other terms, that there was something arranged by parol which is of the essence of the written agreement and not expressed in it." (*Dear v. Verity*, 38 L. J., Ch. 297, 302, *per* Stuart, V.-C.)

Fraud.

An untrue statement or misrepresentation, whether by word or deed, intentionally made by one person or his agent to induce another person to do some act, and relied upon by the other person, constitutes fraud. It is immaterial whether the person making the representation knew it to be false, or made it recklessly, not knowing whether it was true or false.

Misrepresentation.

But it is not necessary to the defence that a misrepresentation should be fraudulent. An innocent misrepresentation of a material matter of fact, or an ambiguous statement of fact understood by the defendant in a sense which was untrue, made by the plaintiff or his agent (*ante*, p. 125; *Mullens v. Miller*, 22 Ch. D. 194; *Cornfoot v. Fowke*, 6 M. & W. 358), in reference to the subject-matter of the contract for the purpose of inducing the contract, and upon which the defendant relies, is a good defence to an action for specific performance. (*Higgins v. Samels*, 2 J. & H. 460; 7 L. T., N. S. 240; *Wall v. Stubbs*, 1 Madd. 80.)

Ordinarily silence is neither misrepresentation or fraud, though it may be either, as being either concealment or tacit representation. Thus, where a lessee for lives obtained an agreement for the renewal of his lease, concealing the fact that the surviving life for which he held was *in extremis*, performance of the agreement was refused (*Ellard v. Llandaff*, 1 Ball & B. 241); and so where the solicitor of one party wrote to the solicitor of the other that he assumed certain facts, and the assumption was erroneous to the knowledge of the other solicitor, but he passed it in silence. (*Andrew v. Aitken*, 31 W. R. 425.)

The misrepresentation must be upon a material point. It is material where it affects the money value of the bargain (*Jennings v. Broughton*, 5 De G., M. & G. 126), or operates, though only slightly, to the defendant's prejudice (*Cudman v. Horner*, 18 Ves. 10), and is not a mere matter of sentiment. (*Fellowes v. Lord Gwydyr*, 1 Sim.

63.) A representation as to the solvency or respectability of an intending tenant would be material. (*Willingham v. Joyce*, 3 Ves. 168; *Canham v. Barry*, 15 C. B. 597; 24 L. J., C. P. 100.)

It must be of a matter of fact. A misrepresentation of a matter of general law is not sufficient. (*Rashdall v. Ford*, L. R., 2 Eq. 750; 35 L. J., Ch. 769.) Neither are statements of opinion in vague and general language of the lessor's estimate of the value of the property merely amounting to commendation or puffing. (*Scott v. Hanson*, 1 Sim. 13.) But it is otherwise of a representation, as a matter of fact, of the price the lessor paid for the property (*Kent v. Freehold Land Co.*, L. R., 4 Eq. 588), or of its former rental. (*Dimmock v. Hallett*, L. R., 2 Ch. 21.) A representation of an intention to do in the future, acts which remain unperformed, and upon the faith of which the contract was made, may be ground for refusing specific performance, the contract being treated as conditional. (*Beaumont v. Dukes*, Jac. 422; *Myers v. Watson*, 1 Sim., N. S. 523.)

It is essential that the defendant should have acted in reliance upon the statement (*Jennings v. Broughton*, 5 De G., M. & G. 126); but it is not necessary that it should have been the sole or even chief inducement to the contract. (*Nichol's case*, 3 De G. & J. 387; 28 L. J., Ch. 270, *per James*, L. J.) It is a question of fact in each case whether or no reliance was placed upon the representation. (*Smith v. Chadwick*, 9 App. Ca. 196; 53 L. J., Ch. 877.) If it is a material representation calculated to induce a person to enter into the contract, it is a fair inference of fact that he entered into the contract relying upon it (*ib.*; *Redgrave v. Hurd*, 51 L. J., Ch. 121; 20 Ch. D. 21; *Arnison v. Smith*, 41 Ch. D. 348); and the burden of proof will lie upon the plaintiff to show that the defendant did not rely upon it. (*Torrance v. Bolton*, L. R., 8 Ch. 118; 42 L. J., Ch. 177.) Thus, if he resorted to the proper means of verification before entering into the contract, it is a matter of inference that he did not rely upon the representation. (*Clapham v. Shilito*, 7 Beav. 149; *Attwood v. Small*, 6 Cl. & F. 232.) But partial investigation is not inconsistent with reliance upon a misstatement. (*Redgrave v. Hurd*, *supra.*) And where the representation was as to the quality of the lime to be made from the stone under a field, a cursory inspection by the defendant, who

was not an expert, of the property to be let, was held not to preclude reliance upon the representation. (*Higgins v. Samels*, 2 J. & H. 460.) Again, it may be matter of inference that the defendant did not rely upon a misrepresentation which was patent (*Colby v. Gadsden*, 15 W. R. 1185), or contradicted by the actual knowledge of the party to whom it was made. (*Dyer v. Hargrave*, 10 Ves. 505.) It is not, however, sufficient that he had the means of knowledge, since he was not bound to avail himself of them. Moreover, it must be clearly shown that the party to whom the representation was made knew that to be untrue which was represented to him as true. (*Price v. Macaulay*, 2 De G., M. & G. 346.) And where a lessor represented a house to be well built, which proved to be the contrary, this was held to be a defence though the lessee might have ascertained its actual state. (*Cox v. Middleton*, 2 Drew. 209; 23 L. J., Ch. 618.)

The defence based on misrepresentation may be lost by acquiescence, as where the lessee of a mine, after knowledge of alleged misrepresentations, continued to work it. (*Vigers v. Pike*, 8 Cl. & F. 562.)

Mistake.

It is a good defence that the defendant executed the agreement under a reasonable misapprehension as to its terms, or as to its effect on a material point as between himself and the plaintiff, for such a mistake indicates the want of mutual assent to the same terms necessary to constitute a contract.

A mistake may be mutual, or of one party only. A mutual mistake is ground for either party resisting performance (*Cochrane v. Willis*, L. R., 1 Ch. 58; 35 L. J., Ch. 36); as where, through a common mistake as to the position of "a fault" referred to as the boundary of minerals agreed to be demised, the area included was largely in excess of that contemplated. (*Davis v. Shepherd*, L. R., 1 Ch. 410; 35 L. J., Ch. 581.) But where the subject-matter of the lease is speculative, as in the case of unopened mines, the non-existence of that which both parties assumed to exist is no defence to an action. (*Jeffreys v. Fairs*, 46 L. J., Ch. 113; 4 Ch. D. 448.)

An agreement will not be enforced where the parties are at cross-purposes, as where the lessor did not intend to include in the lease property which the lessee believed was comprised in the agreement. (*Richards v. London and North Western Rail. Co.*, 20 W. R. 194; *Butterworth v.*

Walker, 13 W. R. 168; *Calcerley v. Williams*, 1 Ves. jr. 210; *Price v. Ley*, 4 Giff. 235.)

The mistake of the defendant alone is ground for refusing specific performance where it would be hard or unreasonable to compel him to perform the agreement. (*Preston v. Luck*, 27 Ch. D. 497; 33 W. R. 317, *per* Cotton, L. J.) The common instances of this are where the plaintiff has been guilty of unintentional misrepresentation, or the use of misleading particulars (*Jones v. Rimmer*, 14 Ch. D. 588; 49 L. J., Ch. 775); or furnishing misleading information (*Moxey v. Bigwood*, 12 W. R. 811); or where, from the ambiguity of the agreement, it is understood in different senses by the parties. (*Manser v. Back*, 6 Hare, 447; *Powell v. Smith*, L. R., 14 Eq. 85; 41 L. J., Ch. 734, *per cur.*) Except in such cases, a defendant is not allowed to evade performance of the contract by a simple statement that he made a mistake. (*Tamplin v. James*, 15 Ch. D. 215; 29 W. R. 311.) If, for example, it appears upon the evidence that there was in the description of the property a matter on which a person might *bonâ fide* make a mistake, and the defendant swears positively that he did make such mistake, and the evidence is not disputed, the Court cannot enforce the agreement against him. (*Ib.*; *Scaisland v. Dearsley*, 29 Beav. 430; 30 L. J., Ch. 625.) If the mistake arose from his own negligence, or was not one which a man with his senses about him could have made, he will not be relieved. (*Ib.*)

The mistake must be one of fact, and not a mistake as to the general principles of law, or as to the legal effect of the agreement he has entered into. (*Powell v. Smith*, L. R., 14 Eq. 85; 41 L. J., Ch. 734.) A mistake in law as to private rights may be a defence, as in the case of a person agreeing to take a lease of his own property, under a mistake as to his rights founded upon an erroneous impression, upon a point of doubtful construction, of the effect of certain prior documents. (*Cooper v. Phibbs*, L. R., 2 H. L. 170; *Earl Beauchamp v. Winn*, 6 *ib.* 234.)

In a case of mistake, a plaintiff may have specific performance of the contract, if he elect to take it in the sense in which the contract was understood by the defendant. (*Preston v. Luck*, 27 Ch. D. 497; 33 W. R. 317; *Higginson v. Clowes*, 15 Ves. 516.)

If, before or at the time of signing a contract, a verbal agreement is entered into between the parties which

Inconsistent
contemporaneous verbal
agreements.

chase, and then let the matter drop for five years, but remained in possession paying rent, and he was held to have lost his right to performance of the contract to purchase, since his possession was not attributable to that contract, but to the tenancy. (*Ib.*)

Default of
plaintiff in
completing on
day fixed.

When the time fixed for completion or giving possession is of the essence of the contract, the plaintiff, who is in default in either respect, cannot enforce the contract. Usually time is not of the "essence of the contract." But it may be made such by express stipulation, using those terms (*Roberts v. Berry*, 3 De G., M. & G. 284, 291), or by providing that if time is not observed the contract shall be void (*Barclay v. Messenger*, 22 W. R. 522); or by implication, as where its observance is a condition precedent to the defendant's obligation arising (*Lord Ranelagh v. Melton*, 13 W. R. 150; *Weston v. Collins*, *ib.* 510); or where from the character of the property, such as a lease of mines (*Parker v. Frith*, 1 S. & S. 199, n.), or property connected with trade (*Walker v. Jeffreys*, 1 Hare, 348; *Wright v. Howard*, 1 S. & S. 190), or other surrounding circumstances, such as purposes of immediate residence (*Tilley v. Thomas*, L. R., 3 Ch. 61; 16 W. R. 166), or business (*Forrer v. Nash*, 35 Beav. 167; 14 W. R. 8), it was clearly the intention of the parties that time should be considered essential. And in such cases possession means possession with a good title shown. (*Tilley v. Thomas*, *supra.*)

Even where the date of possession or completion was not originally of the essence of the contract, but one party has been guilty of improper and unreasonable delay, the other party may by notice call upon him to perform the agreement within a given reasonable period, in default of which the Court will refuse specific performance. (*Macbryde v. Weekes*, 22 Beav. 533; *Compton v. Bagley*, [1892] 1 Ch. 313; 61 L. J., Ch. 113.) The question of whether or not the period given is reasonable depends in such case upon the special circumstances, and must be judged of as at the time when the notice is given. (*Crawford v. Toogood*, 13 Ch. D. 153; 49 L. J., Ch. 108.)

(e.) *Action for Damages.*

Action for
breach of
contract.

If a man enters into a reckless or improvident bargain which he cannot perform in specie, or which the Courts

would not direct him to perform, he will still be liable in damages for its breach. It makes no difference to the right of action for breach of contract that the subject-matter is real estate. In modern practice, where the right to specific performance is doubtful, a claim for damages is usually joined either in the alternative or in addition to one for specific performance.

An instrument which is void as a lease, but good as an agreement for a lease, will support an action for damages for not granting or not accepting a lease (*Bond v. Rosling*, 1 B. & S. 371; 30 L. J., Q. B. 227); but not an action for failure to give possession on or after the date agreed for the commencement of the tenancy (*Drury v. Macnamara*, 25 L. J., Q. B. 5; 5 E. & B. 612); but an agreement which actually creates a tenancy (being for not more than three years) will support an action for default in giving possession. (*Jinks v. Edwards*, 11 Ex. 775; *Coe v. Clay*, 5 Bing. 440, *ante*, p. 112.)

An agreement by a landlord to grant a lease means a valid lease, and is broken whether he is unable to grant a valid lease or refuses to grant any lease. (*Stranks v. St. John*, L. R., 2 C. P. 376; 36 L. J., C. P. 118.) Where the agreement is to grant a lease at a future day, and the landlord either repudiates the agreement, or puts it out of his power to grant the lease before the day arrives, an immediate action will lie. (*Ford v. Tiley*, 6 B. & C. 325; *Lovelock v. Franklin*, 15 L. J., Q. B. 146; 8 Q. B. 371.)

(a) Action against landlord.

The rule as to damages is the same in an action on a contract to grant a lease as on a contract to sell a fee simple (*Roue v. School Board for London*, 57 L. J., Ch. 179; 36 Ch. D. 619), viz., that where the contract cannot be carried into effect because of a defect in the lessor's title, the damages (in the absence of fraud on the defendant's part) will be the amount of any deposit or premium paid (*Roper v. Coombes*, 6 B. & C. 534; *Wright v. Colls*, 8 C. B. 150; 19 L. J., C. P. 60), and any expenses incurred (*Bain v. Fothergill*, L. R., 7 H. L. 158; 43 L. J., Ex. 243; *Rock Portland Cement Co. v. Wilson*, 31 W. R. 193; *Gaslight and Coke Co. v. Touse*, 35 Ch. D. 519; 56 L. T. 602), including the costs of preparing and entering into the agreement, and the costs (if any) of investigating the title (*Hanslip v. Padwick*, 5 Ex. 622; 19 L. J., Ex. 372); but not costs incurred prior to the contract (*Hodges v. Lord*

Measure of damages.

Litchfield, 1 Bing. N. C. 492), or damages for the loss of the bargain. (*Bain v. Fothergill*, *supra*.) And this is so even if the lessor knew that he had not a good title at the time when the contract was entered into. The plaintiff can only recover other damages in an action for deceit. (*Ib.*)

Substantial damages beyond expenses may be recovered where the lessor has acted fraudulently. Moreover, the actual decision in *Bain v. Fothergill* (*supra*) only dealt with the case of a defendant who was *bonâ fide* unable to give a title to that which he had contracted to grant, and does not conflict with the actual decision in *Engell v. Fitch* (L. R., 4 Q. B. 659; 38 L. J., Q. B. 304), that a plaintiff is entitled to recover for the loss of his bargain from a defendant who, from simple caprice or to avoid moderate expense, refuses or neglects to perform the contract. And on a claim for wilful delay in giving possession of the premises agreed to be leased, damages were awarded for loss of profit during the period of default. (*Jaques v. Millar*, 6 Ch. D. 153; *Wesley v. Walker*, 26 W. R. 368; *Royal Bristol, &c. Building Society v. Bomash*, 35 Ch. D. 390; 56 L. J., Ch. 840.) But Kekewich, J., who gave damages in the case last cited, held in *Roue v. School Board for London* (57 L. J., Ch. 179; 57 L. T. 182) that they were not recoverable.

Where the intended lessee is allowed to enter and expend money upon the premises upon the faith of a contract which goes off by reason of the inability or refusal of the lessor to perform it, the lessee is entitled to recover the amount of his outlay as upon a consideration which has failed (*Middleton v. Magnay*, 2 H. & M. 233; 12 W. R. 706); and this, even when the contract is only a verbal one, or a treaty, and not a concluded agreement. (*Pulbrook v. Lawes*, 45 L. J., Q. B. 178; 1 Q. B. D. 284; but see *Worthington v. Warrington*, 8 C. B. 134; 18 L. J., C. P. 350.) And where the action is not upon the contract, but is by a lessee in possession upon a covenant for quiet enjoyment, the damages will be the amount of money necessary to place the plaintiff, as far as possible, in the same position as if the covenant had been performed. (*Lock v. Furze*, L. R., 1 C. P. 441; 35 L. J., C. P. 141.)

(b) Against the tenant.

The landlord may sue the intending tenant for breach of the agreement to become tenant or accept a lease of the premises. (*Forster v. Rowland*, 7 H. & N. 103; 30 L. J.,

Ex. 396; *Collins v. Willmott*, 13 W. R. 204; *De Medina v. Norman*, 9 M. & W. 820.)

The measure of damages is the injury actually sustained by reason of the defendant not having performed his contract, or the liquidated sum fixed as the measure of damages for default. The question is, how much is the plaintiff damnified by the diminution in value of the premises or the loss of rent in consequence of the non-performance of the contract? (*Laird v. Pim*, 7 M. & W. 474.) If the agreement was for a term at a given rent, the plaintiff would be entitled to the difference (if any) between the rent to be paid under the agreement and that at which the premises could be re-let at the date of the breach. (*Ex parte Llynvi Coal and Iron Co., Re Hide*, L. R., 7 Ch. 28; 41 L. J., Bkcy. 5.) If the defendant is let into possession, the landlord may recover for use and occupation for so long as the occupation continues (*Dawes v. Dowling*, 22 W. R. 770), and whether he has entered into possession or not, the value of the premises for such period as they have remained unprofitable to the landlord in consequence of the defendant's agreement to take the premises. In addition, the landlord would be entitled to recover costs of and attending the preparation of the agreement, and (it is assumed) the amount of such special expenditure upon the premises, incurred at the instance of the defendant, as will not increase the letting value of the premises for the purposes for which they are ordinarily let, such as converting the premises into a state suitable for a particular trade intended to be carried on by the defendant.

Measure of damages.

SECT. 3.—*Stamps.*

Leases and agreements for leases must be duly stamped. Duly stamped means stamped according to the purport of the instrument, and not merely for the purpose for which it is offered in evidence. (*Re Whiting to Loomes*, 14 Ch. D. 822; 17 Ch. D. 10; 50 L. J., Ch. 463.) The want of a proper stamp, however, does not affect the validity or legal operation of an instrument. But it shall not, except in *criminal* proceedings (which would include proceedings for offences against the game laws or the like, see *Cattell*

Unstamped instruments not admissible in evidence.

v. *Ireson*, E. B. & E. 91; *Parker v. Green*, 2 B. & S. 299), be given in evidence, or be available for any purpose whatever, unless it is duly stamped in accordance with the law in force at the time when it was first executed. (54 & 55 Vict. c. 39, s. 14, sub-s. 4.)

“Available for any purpose.”

Under the slightly different language of a previous Stamp Act, it was held that an unstamped or insufficiently stamped instrument might be given in evidence to prove a collateral fact, provided no attempt were made to set up the instrument itself. Thus an instrument may be tendered in evidence to show that it is void by reason of fraud. (*Holmes v. Sirsmith*, 7 Ex. 802; 21 L. J., Ex. 312.)

Amount of duty regulated by Act in force at date of execution.

It is to be noticed that when an unstamped or improperly stamped instrument is afterwards stamped, the amount of the stamp will be that required by the Act in force at the date of execution (*Clarke v. Roche*, 3 Q. B. D. 170; 47 L. J., Q. B. 147); and not, as was held under earlier Acts, the amount required when the stamp is actually affixed. (*Buckworth v. Simpson*, 1 C. M. & R. 834; *Deakin v. Penniall*, 17 L. J., Ex. 217.)

May be stamped on payment of penalty.

An instrument not stamped or insufficiently stamped at the time of execution may be stamped at any time afterwards on payment of the unpaid duty and a penalty of 10%.; and if the duty exceeds 10%, then by way of further penalty, interest on such duty at the rate of 5% per cent. per annum from the date of execution. (54 & 55 Vict. c. 39, s. 15, sub-s. 1.) The payment of any penalty or penalties is to be denoted on the instrument by a particular stamp. (*Ib.*, sub-s. 4.) The commissioners have the power, within three months after the first execution, to remit the penalty. (Sub-s. 3 (b).)

In the case of instruments chargeable with an *ad valorem* duty, they are allowed to be stamped without penalty before the expiration of thirty days after first executed (sect. 15, sub-s. 2 (a)); and agreements under hand only, liable to the fixed duty on contracts, are allowed to be stamped without penalty within fourteen days from the date of execution.

Lessee liable to further penalty for unstamped lease.

In the case of a lease or tack executed after the 16th day of May, 1888, not duly stamped, the lessee shall incur a fine of 10%, and in addition to this penalty, payable on stamping the instrument, there shall be paid a further penalty equivalent to the stamp duty thereon, unless a reasonable excuse for the delay in stamping, omission to

stamp, or insufficiency of stamp, be afforded to the commissioners, Court, judge, arbitrator, or referee, before whom it is produced. (54 & 55 Vict. c. 39, s. 15, sub-s. 2 (o).)

If an unstamped or insufficiently stamped instrument is produced in evidence in any Court, or before an arbitrator or referee, and if the instrument is one which may legally be stamped after execution, it may, on payment to the officer of the Court, arbitrator, or referee, of the amount of the unpaid duty and the penalty payable on stamping the same, and a further sum of 1*l.*, be received in evidence. (Sect. 14, sub-s. 1.)

Stamping at trial.

If an unstamped instrument in writing has been lost (*Rex v. Castle Morton*, 3 B. & Ald. 588), or destroyed, even by the party who objects to the evidence (*Rippiner v. Wright*, 2 B. & Ald. 478), parol evidence of the contents is inadmissible, even in an action for specific performance. (*Smith v. Henley*, 1 Ph. 391.)

In the case of a parol tenancy upon the terms of an unstamped instrument, the latter is inadmissible in evidence. (*Turner v. Power*, 7 B. & C. 625.) But if a lease duly stamped refers to an abandoned lease not stamped, or to any other unstamped document, the whole may be considered as one document, and admissible as such. (*Pearce v. Cheslyn*, 4 A. & E. 225.)

Unstamped, incorporated with stamped document.

The duties now payable in respect of leases and agreements for leases are set forth in Appendix A., from which it will be seen that, for a term not exceeding thirty-five years, a lease and an agreement for a lease require the same stamp.

Agreement, when requiring lease stamp.

A mere licence, revocable at any time, is not a "lease or tack" within the schedule to the Stamp Act, and is sufficiently stamped with an ordinary agreement stamp. (*Thames Conservators v. Commissioners of Inland Revenue*, 18 Q. B. D. 279; 56 L. J., Q. B. 181.)

A revocable licence.

An instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of such matters. (54 & 55 Vict. c. 39, s. 4 (a).) Thus a demise of two distinct properties to two several tenants by the same instrument would require stamps on the several rents, and not on the aggregate amount of such rents. (And see *Doe v. Day*, 13 East, 241.) But a demise to the same person of two properties for terms commencing at different dates and at distinct rents for each (*Boase v.*

Instruments having a double operation to be stamped in respect of each matter.

Distinct rents.

Option to purchase.

Jackson, 3 B. & B. 185), or of two farms for terms of different duration, with distinct rents and varying covenants (*Blount v. Pearman*, 1 Bing. N. C. 408), but contained in one instrument, would be held one transaction, and a stamp applicable to the aggregate rent sufficient. Nor would a matter for which the rent was the consideration require a separate stamp. So that a lease is not subject to an agreement stamp in respect of its reserving an option to the lessee to purchase the demised premises. (*Worthington v. Warrington*, 5 C. B. 635; 17 L. J., C. P. 117.) But where a demise of a house contained an agreement to sell it *and other houses* for a certain sum within seven years, it was held to require both a lease and an agreement stamp. (*Lovelock v. Frankland*, 16 L. J., Q. B. 182; 8 Q. B. 371.)

Building leases.

A lease made for any consideration in respect whereof it is chargeable with *ad valorem* duty, and in further consideration either of a covenant by the lessee to make, or of his having previously made, any substantial improvement of or addition to the property demised to him, *or of any covenant relating to the matter of the lease*, is not to be charged with any duty in respect of such further consideration. (54 & 55 Vict. c. 39, s. 77, sub-s. 2.)

What is meant by "any covenant relating to the matter of the lease" is not clear, but presumably it would include the covenant in a tied house to take beer and spirits from the lessor or his nominee.

Penal rents.

No additional duty is payable in respect of any penal rent, or increased rent in the nature of a penal rent, reserved by the lease or agreement; or by reason of the lease or agreement being made in consideration of the surrender or abandonment of any existing lease or agreement relating to the same subject-matter. (54 & 55 Vict. c. 39, s. 77, sub-s. 1.)

Surrender of existing lease.

An instrument having a double operation cannot be used unless sufficiently stamped for both. Thus, where a lease in writing contained a contract for the purchase of fixtures, but was stamped only as an agreement (but as such sufficiently for the fixtures), it was held that it could not be used in evidence in an action for the price of the fixtures unless it bore a lease stamp. (*Corder v. Drakeford*, 3 Taunt. 382.)

Stamp according to operation.

Whatever its form, an instrument must be stamped according to its actual legal operation (*Limmer Asphalte*

Co. v. Inland Revenue, L. R., 7 Ex. 211; 41 L. J., Ex. 106); and accordingly a bill of exchange expressing the terms of an agreement between a landlord and incoming tenant was held inadmissible until stamped as an agreement. (*Nicholson v. Smith*, 3 Stark. 128.)

A mere attornment does not require a stamp (*Doe v. Edwards*, 5 A. & E. 95; *Doe v. Smith*, 8 A. & E. 255); yet if it proceed to state the amount of rent and mode of payment or other special terms, it becomes liable to duty. (*Frankis v. Frankis*, 3 P. & D. 565.)

Attornments.

When a surety is made a party to a lease, joining in one or more of the covenants, no stamp is necessary in addition to the lease stamp. (*Price v. Thomas*, 2 B. & Ad. 218.) But if the guarantee of the rent is a separate and distinct act from the lease, though in the same instrument, an agreement stamp is necessary in addition to the lease stamp. Thus, where there was a written agreement between A. and B. for the tenancy of a public-house with a stipulation to purchase beer from the landlord, and at the end of it a further agreement by a third person to guarantee the payment of money to become due thereunder from the tenant, it was held to require an additional stamp in respect of the guarantee. (*Wharton v. Walton*, 7 Q. B. 474.)

Lease with surety.

An instrument of demise must be stamped in respect of the whole amount of rent reserved or payable under it, whether expressed in terms or by reference. (*Parry v. Deere*, 5 A. & E. 551; *Wilson v. Smith*, 12 M. & W. 401.) And where there was a lease reserving one rent for a house and land, and another rent for furniture and fixtures, a stamp in respect of the former rent alone was held insufficient. (*Coster v. Cowling*, 7 Bing. 456.)

Must cover aggregate rent.

Though a lease for three years is not required to be in writing, if it is, it must be stamped (*Prosser v. Phillips*, Hereford Assizes, 1765, Bull. N. P. 269); and if a written agreement be unstamped, recourse cannot be had to oral evidence to establish the terms of the tenancy. (*Brewer v. Palmer*, 3 Esp. 213.)

Leases for three years.

An instrument whereby the rent reserved by any other instrument chargeable with duty and duly stamped as a lease or tack is increased, is not to be charged with duty otherwise than as a lease or tack in consideration of the additional rent thereby made payable. (54 & 55 Vict. c. 39, s. 77, sub-s. 5.)

Instrument increasing rent reserved by another instrument.

After an instrument has become operative, if it is altered

Alterations

requiring
fresh stamps.

in any material point by consent, it must have a new stamp affixed. (*Reed v. Deere*, 7 B. & C. 261; *Atherstone v. Bostock*, 2 M. & Gr. 511; 10 L. J., C. P. 113.) If the alteration is made after execution by one party, and before execution by the other (*Knight v. Crockford*, 1 Esp. 189), or though made after execution by both, is not material, no fresh stamp is necessary. Thus, an agreement for a lease, with a proviso for giving up a farm at a certain time, to which the words "houses and buildings" were added by consent of the parties, was held not to require a new stamp, the alteration merely expressing what was previously implied. (*Doe v. Houghton*, 1 Man. & R. 208.) Where, after one party has executed a deed, another party present objects to a clause, which is struck out, and the deed is re-executed, it is *in fieri*, and does not require a fresh stamp. (*Jones v. Jones*, 1 Cr. & M. 721; *Hall v. Chandless*, 4 Bing. 123.) An agreement to let premises, a portion of which (in the adverse possession of an under-tenant) it was afterwards agreed to exclude from the letting, would amount to a new demise (*Watson v. Waud*, 8 Ex. 335); but not so a mere agreement to accept a less rent (*Crowley v. Vitty*, 7 Ex. 319; 21 L. J., Ex. 135; *Doe v. Geekie*, 5 Q. B. 841; 13 L. J., Q. B. 239); even if accompanied by a giving up of portion of the demised premises. (*Holme v. Brunskill*, 3 Q. B. D. 495; 47 L. J., P. 610.)

Deeds pre-
sumed to be
properly
stamped.

The presumption is always in favour of the validity and regularity of a deed, and an old deed which bore the marks of having had some stamp was presumed to have been properly stamped. (*Doe v. Coombs*, 12 L. J., Q. B. 36.) And the Court will, in the absence of circumstances inducing a supposition to the contrary, presume that a lost instrument was duly stamped; and so when the instrument is in the custody of the opposite party who refuses to produce it. (*Crisp v. Anderson*, 1 Stark. 35.)

The onus of impeaching an instrument for want of a stamp, or of showing that a higher stamp is necessary, lies on the party who objects to its being received in evidence. (*Wilson v. Smith*, 12 M. & W. 401.)

The production of a counterpart lease is sufficient to raise the presumption that there was an original lease duly stamped. (*Hughes v. Clark*, 10 C. B. 905; *Houghton v. Kanig*, 18 C. B. 235; *Paul v. Meek*, 2 Y. & J. 116; *Homes v. Pearce*, 1 F. & F. 283.)

CHAPTER V.

RIGHTS AND LIABILITIES OF THE PARTIES DURING THE
CONTINUANCE OF THE TENANCY OTHER THAN THOSE
CONNECTED WITH DISTRESS.SECT. 1.—*Quiet Enjoyment.*

IN the absence of express stipulation, the only covenant entered into by the landlord is one for quiet enjoyment.

Covenant for
quiet enjoy-
ment,
defined.

The covenant for quiet enjoyment is an assurance against interruption to possession of the thing demised. It is an undertaking that the tenant shall have the property unfettered by the assertion of any right which interferes with its ordinary and lawful enjoyment. It is in the first place "an assurance against the consequences of a defective title, and of any disturbance thereupon" (*Howell v. Richards*, 11 East, 642, *per* Lord Ellenborough; *Spencer v. Marriott*, 1 B. & C. 457; *Dennett v. Atherton*, L. R., 7 Q. B. 316; 41 L. J., Q. B. 165); and in the next place an assurance against any substantial physical interference with the tenant's enjoyment of the premises caused by the acts of the landlord, or those claiming under him. (*Sanderson v. Mayor of Berwick-on-Tweed*, 13 Q. B. D. 547; 53 L. J., Q. B. 559; *Robinson v. Kilvert*, 41 Ch. D. 88; 58 L. J., Ch. 392.)

The covenant does not increase or enlarge the rights given by the previous part of the deed; but gives a right of action to the lessee if he cannot get, or is deprived of that which was previously professed to be granted. (*Leech v. Schceder*, L. R., 9 Ch. 463; 43 L. J., Ch. 487, *per* Mellish, L. J.)

The covenant for quiet enjoyment runs with the land. (*Campbell v. Lewis*, 3 B. & Ald. 392.) Although no covenants for title are implied by force of the C. A. 1881 (44 & 45 Vict. c. 41), in the case of "a demise by way of

Implied in
every letting.

lease at a rent" (see sect. 7, sub-sect. 5), the law implies in every letting, whether under seal with proper words of demise (*Iggulden v. May*, 9 Ves. 330; *Adams v. Gibney*, 6 Bing. 666), or by parol merely (*Bandy v. Cartwright*, 8 Ex. 913; 22 L. J., Ex. 285; *Robinson v. Kilvert*, 41 Ch. D. 88; *Hall v. City of London Brewery Co.*, 31 L. J., Q. B. 257), a covenant or agreement on the part of the landlord for quiet enjoyment; for whatever words create an estate have a secondary operation, and form a covenant for the quiet enjoyment of such estate as they have already created. (*Per Tindal, C. J., Williams v. Burrell*, 1 C. B. 429; 14 L. J., C. P. 104.)

In case of
tenancy from
year to year,

In the case of a tenancy from year to year, the implied covenant for quiet enjoyment is limited to the duration of the lessor's interest. (*Penfold v. Abbott*, 32 L. J., Q. B. 67; 11 W. R. 169; *Schwartz v. Locket*, 38 W. R. 142; 61 L. T. 719.) So, even in the case of a demise by deed for a longer term than from year to year, if the tenant had notice that the interest of the lessor was terminable and not absolute (*Adams v. Gibney*, 6 Bing. 656); for a lessee cannot recover damages for an infirmity in the title of his lessor of which he knew at the time he entered into the contract. (*Gas Light and Coke Co. v. Towse*, 35 Ch. D. 519; 56 L. J., Ch. 889; 56 L. T. 602.)

or parol
letting; only
co-extensive
with the
lessor's
interest.

And when the instrument of demise, though for a term, is not under seal, the implied covenant is for quiet enjoyment only of the estate *actually* created, and not of so much as is in excess of the landlord's power to create; for the implied covenant is only co-extensive with the interest which the lessor has (*per Coltman, J., Messent v. Reynolds*, 3 C. B. 194; 15 L. J., C. P. 226; *Besley v. Besley*, 9 Ch. D. 103; 38 L. T. 844; 27 W. R. 184), since the law does not imply in a parol demise a covenant on the part of the landlord for good title. (*Bandy v. Cartwright*, *supra*; *Granger v. Collins*, 6 M. & W. 458.)

In a lease by
deed; co-ex-
tensive with
the interest
the lessor
purports to
create.

In the case of a lease under seal (without notice of the lessor's title), there is authority for saying that it is different. In the case of *Line v. Stephenson* (5 Bing. N. C. 183; and see *Burnett v. Lynch*, 5 B. & C. 609), it was held that the effect of the word "demise" in a lease by deed is to create not only an implied covenant for quiet enjoyment, but also one that the lessor has a good title; and, still more recently (*Hart v. Windsor*, 12 M. & W. 85; *Mostyn v. West Mostyn Coal Co.*, 45 L. J., C. P. 405;

1 C. P. D 145), that the word "let," or any equivalent word in a lease by deed, will have the same effect. These decisions are, however, in conflict with the views expressed in other cases. (*Penfold v. Abbott*, 32 L. J., Q. B. 67; *Adams v. Gibney*, 6 Bing. 666; *Messent v. Reynolds*, 3 C. B. 194.)

In an agreement for a lease there is no implied promise for quiet enjoyment. (*Brashier v. Jackson*, 6 M. & W. 549.) But a tenant in possession under an agreement for a lease of which specific performance would be granted, now stands in the same position as if the lease had been granted (*Walsh v. Lonsdale*, 21 Ch. D. 9; *Lowther v. Heaver*, 41 Ch. D. 248; and see *Onions v. Cohen*, 34 L. J., Ch. 338), and is therefore entitled to the benefit of an implied covenant for quiet enjoyment.

As we shall see (*infra*, p. 166), a covenant for quiet enjoyment is broken if the lessor does not give the tenant possession. And an agreement which operates as an actual letting amounts to an agreement to give possession. (*Coe v. Clay*, 5 Bing. 440; *Jinks v. Edwards*, 11 Ex. 775.) But an agreement for a lease for more than three years, to commence at a future day, does not imply in itself a promise to give possession on that day (*Drury v. Macnamara*, 25 L. J., Q. B. 5; 5 E. & B. 612), though the agreement might be specifically enforced; or support an action for damages for not granting the lease. An agreement to grant a lease contains an implied undertaking that the lessor has title to grant such lease; and if he has not, he is liable to an action at the suit of the intended lessee. (*Stranks v. St. John*, 36 L. J., C. P. 118; L. R., 2 C. P. 376; *De Medina v. Norman*, 9 M. & W. 820.)

An express covenant for quiet enjoyment excludes any implied covenant either for quiet enjoyment or for title, and in such a case the terms of the particular covenant are alone to be looked to, to ascertain the rights and liabilities of the parties. (*Merrill v. Frame*, 4 Taunt. 329; *Line v. Stephenson*, 5 Bing. N. C. 183; *Mostyn v. West Mostyn Coal Co.*, 1 C. P. D. 145; *Dennett v. Atherton*, L. R., 7 Q. B. 316; 41 L. J., Q. B. 165.)

This rule sometimes operates to curtail the rights of the tenant, where an agreement for a lease is followed by an actual lease containing a covenant for quiet enjoyment. A lease is a sale *pro tanto*, and as upon a sale the maxim *caveat emptor* applies, so upon taking a lease it is caveat

Agreement for a lease raises no implied promise for quiet enjoyment;

or promise to give possession;

but amounts to an undertaking for title.

Express covenant for quiet enjoyment supersedes implied covenant.

Effect of rule where agreement followed by lease.

the lessee. Therefore, where the lessor is himself a termor, and the agreement is for an underlease, the underlessee, before taking his demise, must at his peril ascertain that his lessor has power to grant the underlease. After the lease is granted, it alone governs the rights of the parties (*Leggott v. Barrett*, 15 Ch. D. 306; 28 W. R. 962); and if, by reason of its containing a qualified covenant for quiet enjoyment, the implied covenant for title is excluded, the lessee will have no right of action for damages, though the lessor may have purported to grant a lease in excess of his estate (*Besley v. Besley*, 9 Ch. D. 103; 27 W. R. 184; *Clayton v. Leech*, 41 Ch. D. 103; 37 W. R. 663; 61 L. T. 69), unless the contract contained a clause for compensation which is not dealt with by the lease. (*Palmer v. Johnson*, 13 Q. B. D. 351; 53 L. J., Q. B. 348.)

Absolute or qualified.

The implied covenant for quiet enjoyment is an absolute and unqualified one. An express covenant may be either absolute, extending to the acts of all persons indiscriminately; or qualified, limiting it to the acts of particular classes of persons, and the lessor's liability for the acts of persons having rightful title will be measured by the actual terms of the covenant. If it be for quiet enjoyment "against all persons whatsoever lawfully claiming the same" (*Williams v. Burrell*, 1 C. B. 402; 14 L. J., C. P. 98), or that the lessee "shall peaceably and quietly enjoy during the term" (*Onions v. Cohen*, 34 L. J., Ch. 338), it will be absolute, and extend to all persons who have or acquire a rightful title to the property during the continuance of the term. (*Howell v. Richards*, 11 East, 633.)

How usually qualified.

In modern practice, the covenant usually inserted is a qualified one against interruption by the lessor, or any person rightfully claiming "from or under him."

Meaning of "claiming under" the covenantor.

Supposing the covenant to be thus qualified, then any person whose title arises by the act or procurement of the lessor is a person claiming under him. Thus, his widow claiming in respect of her dower is a person claiming under him (1 Shep. Touch. 171); but not so his mother in respect of her dower. A person claiming under a settlement (*Evans v. Vaughan*, 4 B. & C. 261), or a prior lease (*Ludwell v. Newman*, 6 T. R. 458; *Rolph v. Crouch*, 37 L. J., Ex. 8; L. R., 3 Ex. 44; *Sanderson v. Mayor of Berwick-on-Tweed*, 13 Q. B. D. 551), or prior mortgage (*Carpenter v. Parker*, 3 C. B., N. S. 206), made by the landlord, is a person claiming under him. So is a person claiming under an appointment made

by the lessor, either alone or jointly with another person, and whether the power was created by him or with his concurrence or not, and notwithstanding the estate did not move from him. (*Calvert v. Sebright*, 15 Beav. 156; *Hurd v. Fletcher*, 1 Doug. 43; *Carpenter v. Parker*, 3 C. B., N. S. 206; 27 L. J., C. P. 78.)

On the other hand, a qualified covenant against interruption by the lessor and all persons claiming "by, from or under him," will not extend to an eviction by a person claiming a title paramount to him (*Merrill v. Frame*, 4 Taunt. 329); and the terms, persons claiming "by, from and under" the lessor, do not include a person claiming against him, as in the case of a distress for land tax due from the landlord before the demise. (*Stanley v. Hayes*, 3 Q. B. 105; 11 L. J., Q. B. 176.) A superior landlord is not a person claiming by, from, through, or under the lessor. (*Kelly v. Rogers*, [1892] 1 Q. B. 910; 61 L. J., Q. B. 604; *Spencer v. Marriott*, 1 B. & C. 457; *Dennett v. Atherton*, L. R., 7 Q. B. 316; 41 L. J., Q. B. 165; *Besley v. Besley*, 9 Ch. D. 103; 27 W. R. 184.)

Primâ facie, the covenant is prospective, and would only extend to acts done or omitted after the granting of the lease. (*Anderson v. Oppenheimer*, 5 Q. B. D. 602; 49 L. J., Q. B. 709; *Spoor v. Green*, L. R., 9 Ex. 99; 43 L. J., Ex. 57.)

Covenant is prospective.

The covenant extends to protect the lessee against all disturbances, whether wrongful or otherwise, by the lessor (*Care v. Brookesby*, W. Jones, 360; *Lloyd v. Tomkies*, 1 T. R. 671; *Andreus v. Paradise*, 8 Mod. 318), or by his servants or agents, if acting under his authority. (*Seaman v. Brownrigg*, 1 Leon. 157.) But even the acts of the lessor, in order to amount to a breach of covenant, must be done in the assertion of a right as distinguished from a mere trespass. (*Crosse v. Young*, 2 Show. 425; *Lloyd v. Tomkies*, *supra*.) Thus, to enter for the purpose of sporting is no breach. (*Seddon v. Senate*, 13 East, 72.)

Is against all disturbances by lessor;

As regards other persons than the lessor and his agents, both implied and express general covenants for quiet enjoyment are confined to lawful, and do not extend to wrongful, evictions; for the law will never adjudge that a lessor covenants against the wrongful acts of strangers, except his covenant be express for that purpose. (*Hayes v. Bickerstaff*, Vaugh. 118; *Nash v. Palmer*, 5 M. & S. 379, *per* Lord Ellenborough; *Dudley v. Folliott*, 3 T. R.

but only lawful disturbances of other persons;

584; *Wotton v. Hele*, 2 Wms. Saund. 178 b; *Jeffryes v. Evans*, 19 C. B., N. S. 246; 34 L. J., C. P. 261; *Sanderson v. Mayor of Berwick-on-Tweed*, 13 Q. B. D. 547.) Thus, where the plaintiff held, as tenant to the defendants, a farm, through which ran drains which C., another tenant, was entitled to use by virtue of a prior demise from the defendants, and the plaintiff claimed damages against the defendants; first, in respect of the excessive user by C. of some of the drains which were properly constructed; and secondly, in respect of the proper use by C. of other drains which were improperly constructed, it was held that for the first, which was merely the tortious act of C., the defendants were not liable; but for the second, which was a lawful user by C. under the authority conferred by the defendants, they were liable. (*Sanderson v. Mayor of Berwick-on-Tweed*, *supra*.)

unless naming
particular
individuals,

To this rule there are two exceptions. First. A covenant against the acts of particular individuals extends to all their acts, whether by lawful or wrongful title. (*Nash v. Palmer*, 5 M. & S. 374; *Fowle v. Welsh*, 1 B. & C. 29.)

or pretended
claims.

Second. A covenant against all persons claiming or *pretending* to claim a right in the premises extends to tortious as well as legal interruptions. (*Chaplain v. Southgate*, 10 Mod. 384; *Perry v. Edwards*, 1 Stra. 400.)

How broken:

The covenant for *title* is broken by the existence of an adverse title in another. The covenant for *quiet enjoyment* is broken only when the covenantee is disturbed. (*Per Kelly*, C. B., *Spoor v. Green*, L. R., 9 Ex. 99; 43 L. J., Ex. 57; *Howard v. Maitland*, 53 L. J., Q. B. 42; 11 Q. B. D. 695; 1 Shep. Touch. 171.) And it is in every case a question of fact whether or not there has been a breach (*Sanderson v. Mayor of Berwick-on-Tweed*, 13 Q. B. D. 547; 53 L. J., Q. B. 559; *Robinson v. Kilvert*, 41 Ch. D. 88; 61 L. T. 60); the covenant being construed with reference to the transaction, and so as to give effect to what may be reasonably supposed to have been intended by the parties. (*Harrison v. Muncaster*, [1891] 2 Q. B. 680; 61 L. J., Q. B. 102; see *Kelly v. Rogers*, [1892] 1 Q. B. 910; 61 L. J., Q. B. 604.)

by failure to
give posses-
sion;

It is broken if the lessor is unable or fails to give a legal right to enter and enjoy the premises without the permission of any other person, as where they are in the possession of a third person under a prior lease from the lessor (*Ludwell v. Newman*, 6 T. R. 458); or where possession is

refused by the lessor himself. (*Hawkes v. Orton*, 5 A. & E. 367; 1 Wms. Saund. 322.) The case of *Jerritt v. Weare* (3 Price, 575), deciding that possession of part of the property, by persons claiming under leases made by a stranger, is not a breach, is doubtful. (Sugden, V. & P. 601.)

Any proceeding in a court of law interfering with the title and possession of the land amounts to a breach of a covenant for quiet enjoyment; *e.g.*, an action of ejectment or for trespass by a person having a lawful title. On the other hand, such a proceeding interfering only with a particular mode of enjoyment of the land or part of it, but not with the title or possession,—*e.g.*, an action to enforce the observance of restrictive covenants—is not a breach. (*Dennett v. Atherton*, L. R., 7 Q. B. 316; 41 L. J., Q. B. 165.) In the case last cited, a person who had covenanted with the former owner of the fee not to allow the premises to be used for the trade of beer selling, let them to a person who had no notice of this covenant. The lease contained a covenant by the lessee not to carry on certain trades, without mentioning that of a beer-seller, and the assignee of the lessee having used the premises as a beer shop was restrained by injunction from doing so at the suit of the former owner of the fee, and thereupon he commenced an action against the landlord for breach of the covenant for quiet enjoyment; but it was held that the covenant did not guarantee to the tenant that he might use the land for any purpose not included in his restriction. A judgment declaratory of rights of common over the demised premises is not, in the absence of any other act interfering with the tenant's enjoyment, a breach of the covenant. (*Howard v. Maitland*, 11 Q. B. D. 695; 53 L. J., Q. B. 42.)

Any wilful act of the lessor interfering with the plaintiff's possession of the property demised, including its easements, is a breach of the covenant. Thus, if the lessor covenant that the lessee shall enjoy a certain close, and afterwards put up a gate on land not included in the demise by which the lessee is obstructed in passing to the land demised (*Andrews v. Paradise*, 8 Mod. 318); or lease a watercourse, and afterwards stop it up; or a house and estovers, and destroy all the wood (*Pomfret v. Ricroft*, 1 Wms. Saund. 321); or build on his own adjoining land, so as to darken the lessee's windows. (But see *Potts v.*

by litigation
adverse to
title and pos-
session ;

by lessor's
interference
with tenant's
possession ;

Smith, 38 L. J., Ch. 58; L. R., 6 Eq. 311; *Booth v. Alcock*, L. R., 8 Ch. 663; 42 L. J., Ch. 557.) Sending a notice to the lessee's tenant not to pay rent to the lessee is a breach of the covenant for quiet enjoyment, if the tenant act upon it (*Edge v. Boileau*, 16 Q. B. D. 117; 53 L. T. 907; 55 L. J., Q. B. 90), not otherwise. (*Witchcot v. Nine, Brown. & Gold*. 81; 2 Platt, Leases, 289.)

by lessor's
failure to
prevent
interference
of others;

The covenant is also broken by any disturbance resulting from a person enforcing a charge which the lessor ought to have satisfied. (*Hancock v. Caffyn*, 8 Bing. 358.) But a covenant that the lessor had not "done, or permitted or suffered to be done, any act, &c.," was held not to be broken by his having assented to an act which he could not prevent. (*Hobson v. Middleton*, 6 B. & C. 295.)

by inter-
ference with
lawful enjoy-
ment of
premises.

Where the ordinary and lawful enjoyment of the demised land is substantially interfered with by the acts of the lessor or those lawfully claiming under him, the covenant is broken, although neither the title to nor the possession of the land may be otherwise affected. (*Sanderson v. Mayor of Berwick-on-Tweed*, 33 W. R. 67; 53 L. J., Q. B. 559; 13 Q. B. D. 547.) Thus, where the plaintiff held as tenant to the defendant a farm through which ran drains, which C., another tenant, was, by virtue of a prior demise, entitled to use; and the plaintiff's land was injured by the proper user by C. of the drains which were improperly constructed, this was held to constitute a breach of the covenant for quiet enjoyment. (*Ib.*) So where the landlord demised a bed of coal and afterwards, in working the minerals in the stratum above, bored a hole through the roof of the coal mine and caused it to be flooded. (*Shaw v. Stenton*, 2 H. & N. 858; 27 L. J., Ex. 253; but see *Harrison v. Muncaster*, [1891] 2 Q. B. 680.) But there must be actual physical interference with the thing demised. The covenant is not broken by a nuisance committed on adjoining property owned by the lessor. (*Jenkins v. Jackson*, 40 Ch. D. 71; 58 L. J., Ch. 124; 60 L. T. 105.)

Moreover, it must be interference with the ordinary user of the demised premises. Thus, where a landlord let the ground floor of a building for a paper warehouse, and afterwards used the cellar for a manufacture which required heat and dry air, thereby raising the temperature of the tenant's room, and making it unfit for the storage of a particular kind of paper, but not unfit for a paper warehouse; it was held, that as the landlord was ignorant at the time

of letting that the property was to be used for the storage of exceptionally delicate paper, there was no breach of the implied agreement for quiet enjoyment. (*Robinson v. Kilvert*, 41 Ch. D. 88; 61 L. T. 60; 37 W. R. 545.) It would have been otherwise had the landlord's user of his own premises rendered the tenant's room unfit for storing ordinary paper. (*Ib.*; *per* Lindley, L. J.)

The covenant does not oblige the lessor to rebuild in case the premises are destroyed. (*Brown v. Quilter*, Amb. 619.)

A covenant for quiet enjoyment of a right of sporting, is not broken by destroying furze, coverts, or underwood (*Jeffryes v. Evans*, 19 C. B., N. S. 246; 34 L. J., C. P. 261; *Newton v. Wilmot*, 8 M. & W. 711); or cutting down trees (*Gearns v. Baker*, 44 L. J., Ch. 334; L. R., 10 Ch. 355) in the proper course of management of the property; or by offering the property for sale in lots as building premises. (*Pattison v. Gilford*, 43 L. J., Ch. 524; L. R., 18 Eq. 259.)

In a licence to sport.

A breach of covenant for quiet enjoyment does not discharge the tenant from any liability under his lease, except the liability to pay rent. (*Morrison v. Chadwick*, 18 L. J., C. P. 189; 7 C. B. 283; *Newton v. Allin*, 1 Q. B. 519.)

Breach of, only suspends rent.

The rights under this covenant are not conditional upon the observance of other covenants in the lease, so that the non-payment of rent does not disentitle the lessee to the protection of the covenant for quiet enjoyment (*Dawson v. Dyer*, 5 B. & Ad. 584; *Edge v. Boileau*, 16 Q. B. D. 117), even though the covenant run "the lessee paying the rent and performing the covenants," shall quietly enjoy. (*Ib.*; *Hayes v. Bickerstaff*, Vaugh. 118; 2 Mod. 34.)

Rights under, independent of other covenants.

The measure of damages for breach of covenant for quiet enjoyment depends upon the nature of the disturbance. If there is no eviction, the measure of damage is the actual damage sustained down to the time of the assessment (R. S. C., Ord. XXXVI. r. 58); and where there is no evidence as to actual damage, the plaintiff will be entitled to nominal damages. (*Child v. Stenning*, 11 Ch. D. 82; 48 L. J., Ch. 392.) The damages on eviction are the value of the unexpired residue of the term, with such other actual damage as the plaintiff has sustained. (*Williams v. Burrell*, 1 C. B. 402; 14 L. J., C. P. 98; *Lock v. Furze*, L. R., 1 C. P. 441; 35 L. J., C. P. 141; *Rolph v. Crouch*, L. R., 3 Ex. 44; 37 L. J., Ex. 8.) The damages for a breach of covenant for quiet enjoyment by reason of rights of way

Measure of damages.

over the property, was held to be the difference in the value of the land free from the rights of way and fettered. (*Sutton v. Baillie*, 65 L. T. 528.)

SECT. 2.—*Acts in Derogation of the Grant.*

Akin to the obligation arising from the covenant for quiet enjoyment is the landlord's obligation arising from the maxim that a grantor shall not derogate from his grant. (*Palmer v. Fletcher*, 1 Lev. 122.)

A lessor may not by his voluntary acts prejudice any rights which he has created. Thus, he cannot use his adjoining land so as to interfere with the rights of the land he has leased. (*Mitchell v. Cantrill*, 57 L. J., Ch. 75, per Lopes, L. J.) The most familiar application of the rule is the restriction which prevents the landlord from using his adjoining land so as to interfere with the lights or other easements of the land leased. (*Ante*, p. 84; *Wheeldon v. Burrows*, 12 Ch. D. 31; 48 L. J., Ch. 853.)

A grantor of a licence cannot derogate from his grant by subsequent licences which would interfere with it. (See *Newby v. Harrison*, 1 J. & H. 393; 9 W. R. 849; *Carr v. Benson*, L. R., 3 Ch. 524; 16 W. R. 744.)

SECT. 3.—*Warranty as to Availability and Fitness.*

Caveat emptor
as to title and
condition.

Unless some fraud or deception is practised upon the lessee, the maxim of *caveat emptor* imposes upon him the duty of informing himself as to the state of the title (*Cosser v. Collinge*, 3 My. & K. 283), and condition of the premises, and also of bargaining for any special protection he may need from the lessor in the user of the premises.

As between himself and third parties, a lessee has constructive notice of his lessor's title, whether he investigate it or not (*Mogridge v. Clapp*, [1892] 3 Ch. 382), and is bound by any restrictive covenants affecting the property notwithstanding a representation by the lessor that no such covenants exist. (*Patman v. Harland*, 17 Ch. D. 353; 50 L. J., Ch. 642.)

There is no implied promise on the part of a landlord, whether he is the freeholder or only a leaseholder, that the premises are free from restrictive covenants, or that they may be used for any purpose the tenant may have in view (*Jackson v. Cobbin*, 8 M. & W. 790); or, in case the lease prohibits certain trades, that the premises may be used for any trade other than those prohibited. (*Dennett v. Ather-ton*, L. R., 7 Q. B. 316; 41 L. J., Q. B. 165.) And a covenant in a sub-lease that the lessee shall, at the expiration of the term, deliver up "all landlord's fixtures," was held not to import a warranty that the removal of trade fixtures was not prohibited by the superior lease. (*Porter v. Drew*, 5 C. P. D. 143; 49 L. J., C. P. 482.) So an agreement to grant a lease which was to contain the usual covenants, and particularly those contained in the lease under which the premises were held, "so that the same" in no way restricted the trade of a retailer of beer, was held to amount to an agreement to grant a lease without such a restriction, but was not a warranty that the original lease contained no such restriction. (*Hayward v. Parkes*, 24 L. J., C. P. 217; 16 C. B. 295.)

No implied warranty of availability by reason of freedom from restrictions;

If, however, the lessor is informed by the lessee as to the business he intends to carry on, and the lessor do not inform him there is a covenant prohibiting such business, silence is equivalent to a representation that there is no such prohibitive covenant. (*Flight v. Barton*, 3 My. & K. 282; *Power v. Barrett*, 19 L. R., Ir. 450.)

There is no implied promise on the part of the lessor to do any act necessary to render the premises available for the purposes for which they were known to be taken. Thus, where a basement was let for the storage of cartridges, with a covenant by the lessor to keep the premises in proper repair and condition, so that they might at all times be available by the lessee for the storing of cartridges, and a subsequent Act of Parliament having made it illegal to use the premises for storing cartridges without a licence, it was held that the covenant only imposed upon the lessor obligations as to the physical condition of the premises, and did not impose upon him the duty of obtaining a licence to make the storage legal. (*Newby v. Sharpe*, 8 Ch. D. 39; 26 W. R. 685; 47 L. J., Ch. 617.)

or by reason of acts to be done by the lessor;

Where the landlord is not aware at the time of letting that the premises are intended to be used for an exceptionally delicate trade, there is no implied promise on his part

or by reason of acts to be abstained from by lessor.

that he will not use his adjoining premises so as to interfere with such trade. (*Robinson v. Kilkert*, 41 Ch. D. 88.) But where a landlord, during negotiations for a lease, represented that his adjoining houses would only be let for private dwellings, he was restrained from authorizing any of such houses being used for trade. (*Spicer v. Martin*, 14 App. Ca. 12; 58 L. J., Ch. 389.)

No implied warranty as to physical condition on a lease of real estate.

There is at common law no implied warranty on the letting of real estate (that is, unfurnished houses or land), that as to its physical condition it is or shall be reasonably fit for habitation, occupation, or cultivation; nor is there any implied contract that it is fit for the purpose for which it is let. (*Hart v. Windsor*, 12 M. & W. 68; *Manchester Bonded Warehouse Co. v. Carr*, 5 C. P. D. 507; 49 L. J., C. P. 809; *Chester v. Powell*, 52 L. T. 722.) Before taking a farm or house the tenant should go and see the state it is in (*Erskine v. Adeane*, 42 L. J., Ch. 835; L. R., 8 Ch. 756), and if he neglect to do so he must still take the property as he finds it; although in the case of land it may not be fit for the purpose for which it was taken by reason of being partly manured with a poisonous substance (*Sutton v. Temple*, 12 M. & W. 52), or not being free from noxious plants (*Erskine v. Adeane*, *supra*); and in the case of an unfurnished house, though it may be ruinous, uninhabitable, or dangerous. (*Hart v. Windsor*, *supra*; *Keates v. Earl Cadogan*, 20 L. J., C. P. 76; 10 C. B. 591; *Bartram v. Aldous*, 2 Times L. R. 237.)

Except by statute.

An exception as to implied warranty has been made in the case of houses let to the poor, by the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), which enacts, by sect. 75, that "in any contract made after the 14th August, 1885, for letting for habitation by persons of the working classes a house or part of a house, there shall be implied a condition that the house is at the commencement of the holding in all respects reasonably fit for human habitation. In this section the expression 'letting for habitation by persons of the working classes,' means the letting for habitation of a house, or part of a house, at a rent not exceeding in England the sum named as the limit for the composition of rates by sect. 3 of the Poor Rate Assessment and Collection Act, 1869, [(32 & 33 Vict. c. 41), *i.e.*, not exceeding 20% if in the metropolis, 13% if in Liverpool, 10% if in Manchester or Birmingham, or 8% if elsewhere] and in Scotland or Ireland, 4%." This

statutory condition may be evaded by contract. Under the Act a tenant is entitled to sue for damages suffered through structural as well as through sanitary defects. (*Walker v. Hobbs*, 23 Q. B. D. 458; 59 L. J., Q. B. 93.)

In the letting of furnished houses or apartments the common law rule as to warranty is different. That is a mixed contract for realty, and for goods and chattels, and in such a letting there is an implied condition that the house is reasonably fit for occupation and comfortable habitation on and from the day on which the tenancy is to commence. (*Wilson v. Finch-Hatton*, 46 L. J., Ex. 489; 2 Ex. D. 336.) And the condition is equally broken whether the unfitness arise from defects in the house itself, as bad drainage (*ib.*), or from the furniture being unfit for use, or from the place becoming uninhabitable by reason of dirt or vermin (*Smith v. Marrable*, 11 M. & W. 5; and see *Sutton v. Temple*, 12 M. & W. 60; *Hart v. Windsor*, 12 M. & W. 87; *Campbell v. Wenlock*, 4 F. & F. 716; *Harrison v. Malet*, 3 Times L. R. 58; *Charsley v. Jones*, 5 Times L. R. 412), or being dangerous on the ground of infection. (*Bird v. Lord Granville*, Cab. & El. 317.) In such case the tenant is entitled to throw up house and furniture at the earliest moment the defect is discovered, and to take proceedings for breach of contract. The implied condition only applies to the state of the house at the commencement of the term; there is no implication as to its continuance. (*Macleane v. Currie*, Cab. & El. 361.)

Warranty on a lease of furnished houses.

In the case of part of a house let to be occupied during business hours only, there was held to be no liability on the part of the landlord to provide sufficient protection against robbery. (*Espir v. Todd*, Cab. & El. 154.)

An express warranty is often created in the course of negotiations by a representation made by the landlord, upon the faith of which the tenant takes the premises. Such was the case of *Bunn v. Harrison* (3 Times L. R. 146), in which the landlord had stated that the sanitary arrangements were perfect. "Where," said Lord Esher, M. R., "a statement was made at the time of a verbal contract, and for the purpose of the contract, that statement must be taken to be part of the contract. Here the plaintiff stated that the house was in a perfect sanitary condition. Not only was there a warranty ordinarily so called, but also a warranty which went to the whole root

Express warranty by representation.

of the contract. There was a condition and a warranty. The condition upon which the defendant took the house was broken, and she was not bound to pay the rent, as she did not take to the house, and left it within a reasonable time. There was also a breach of warranty upon which she could recover damages." (*Ib.*)

It must be borne in mind that the remedy in respect of breach of a warranty and of a condition is different. For a breach of warranty the tenant cannot avoid the agreement and be off his bargain, but must resort to his remedy by way of damages. But for breach of a condition, as where it is an essential part of the bargain that the thing leased should answer a given description and possess certain qualities which form part of that description, and it does not do so, the contract becomes at once voidable by the tenant. (See *Behn v. Burness*, 32 L. J., Q. B. 204; *Bannerman v. White*, 31 L. J., C. P. 28; 10 C. B., N. S. 844; *Leake*, 334.)

Misrepresentations not forming part of the contract.

Untrue parol representations made pending the treaty for a lease and inducing the contract, though not forming a substantive part of the contract, may give a right of action in respect of the representation. Thus:—

(1.) If the representations were false to the knowledge of the landlord, or made recklessly without caring whether they were true or false, the tenant may recover damages for the fraud. (*Derry v. Peek*, 14 App. Ca. 337; 58 L. J., Ch. 864; *Saunders v. Paroley*, 2 Times L. R. 590.)

(2.) If untrue, but made in an honest belief in their truth, no action for damages will lie. (*Burtsal v. Bianchi*, 65 L. T. 678.)

(3.) But, notwithstanding a representation is honestly made, if it is untrue the tenant is entitled to a rescission of the lease notwithstanding he has entered and occupied. (*Adam v. Newbigging*, 13 App. Ca. 308; 57 L. J., Ch. 1066.) "Supposing that, in consequence of a misrepresentation as to the drainage of a house, I am induced to take a lease of the house and to occupy it, the misrepresentation is innocent, but I have a right to have the contract set aside." (*Per Bowen*, L. J., 56 L. J., Ch. 284.)

If a man resort to the proper means of verifying the statements made to him before he enters into the contract, it will be assumed that he relied upon the result of his own investigation and not upon the representation. (*Clapham v. Shilito*, 7 Beav. 146, *ante*, p. 147.)

Damages once recovered in an action for misrepresentation exhausts the tenant's right of action. (*Clarke v. Yorke*, 52 L. J., Ch. 32; 47 L. T. 381.)

SECT. 4.—*Obligations and Restrictions as to Building.*

Building leases usually contain stipulations for building within a definite period, erections of a particular class, or of a stipulated value, for the observance of a given building line, and the like.

As between landlord and tenant, a covenant to build on the demised premises runs with the land if the word assigns is used in the covenant. (*Spencer's case*, 1 Sm. L. C. 65, 9th ed.; *Easterby v. Sampson*, 6 Bing. 644; *Re Fawcett's Trustees and Holmes*, 42 Ch. D. 150; 61 L. T. 105.)

Covenant to build, runs with the land;

If in a building lease of premises upon which old houses are standing, a person covenants to "new build" the premises, he must rebuild the whole; for rebuilding some and repairing others is not a compliance with the covenant. (*City of London v. Nash*, 3 Atk. 512; *Doe v. Withers*, 2 B. & Ad. 896.) But where a lease of four messuages contained a covenant to repair, and a further covenant within the first fifty years of the term to take down the demised messuages as occasion might require, and in the place thereof erect four other good and substantial brick messuages, it was held that the words "as occasion might require" left to the option of the lessee to satisfy the covenant by having on the land four houses as good as new, either by rebuilding or repairing. (*Evelyn v. Raddish*, 7 Taunt. 411.)

not satisfied by repairs.

The ordinary covenant with regard to building, where a ground rent is reserved, is that the lessee shall build within a definite period of no long duration, generally two years at the most. (*Andrew v. Aitken*, 52 L. J., Ch. 294; 22 Ch. D. 218, *per Fry*, J.)

Time for performance of covenant.

A covenant to build an additional house at any time at the request of the grantor is not "usual," and a purchaser who has contracted for the purchase of a lease containing such a covenant, upon a representation that it contains no unusually restrictive covenants, is entitled to be relieved from his contract. (*Andrew v. Aitken*, *supra*.)

If the landlord by his conduct induces the tenant to believe that performance within the stipulated time will not be insisted upon, he cannot afterwards treat the non-performance within the time as a ground of forfeiture. (*Birmingham and District Land Co. v. London & N. W. Rail. Co.*, 60 L. T. 527.)

Building agreement as to several plots, separable.

Where, by a building agreement, the landlord agrees to grant to the builder separate leases of successive plots of land as the houses upon each of them shall be built to a certain stage, the agreement is separable, and can be enforced by the builder or his assigns as to part of the premises, although, with regard to the other part, the builder may have committed an act of forfeiture by not building within the stipulated time. (*Wilkinson v. Clements*, L. R., 8 Ch. 96; 42 L. J., Ch. 38; *Lowther v. Heaver*, 41 Ch. D. 248; 58 L. J., Ch. 482.)

Building line.

When land is laid out according to a plan for securing uniformity, and a lessee covenants not to erect any "building" in advance of the general line of frontage, or within a certain distance from the street, this does not prevent him erecting at the extremity of his land an ordinary boundary wall. (*Child v. Douglas, Kay*, 560; *Bowes v. Law*, 39 L. J., Ch. 483; L. R., 9 Eq. 636.) But a wall fifteen feet high (*Child v. Douglas, supra*), or eleven feet six inches high, erected for the purpose of forming the back of vineries and a greenhouse (*Bowes v. Law, supra*), is a "building" infringing the covenant.

A covenant as to the observance of a frontage line was held not to be broken by the projection a few inches too far of the lower part of the wall of a house, nor by a brick porch which came forward a foot within the limit. (*Child v. Douglas, supra*.) But bay windows carried up to the roof, and projecting three or four feet in advance of the line of frontage, were held to be a breach of the covenant. (*Lord Manners v. Johnson*, 1 Ch. D. 673; 45 L. J., Ch. 404.)

Where at the date of the covenant the houses were already built, and the covenant prohibited any trees or buildings whatsoever in the garden exceeding a certain height, it was held that "garden" meant the whole space from the back wall of the house to the extremity of the plot, although not used as a garden, and that a bow, which was to project eight feet from the house and carried above the prohibited height, was a violation of the covenant.

(*Western v. McDermott*, L. R., 1 Eq. 499; 2 Ch. 72; 36 L. J., Ch. 76.)

A covenant that land shall be left open and not built upon is enforceable (*McLean v. McKay*, L. R., 5 P. C. 327); and a covenant not to "erect or make any building or erection on any part of the demised premises," was held to be broken by the erection of wooden hoardings for advertisements. (*Pocock v. Gilham*, Cab. & E. 104.) But a covenant by grantors that an open space in the centre of a square should be kept "open and unbuilt upon," was held not to be broken by an excavation for a public urinal intended to be covered with a roof slightly projecting above the surface of the ground. (*Graham v. Corporation of Newcastle-upon-Tyne*, 67 L. T. 260, 790.)

Covenant not to build on land.

A covenant to rebuild a house will not involve the obligation to erect the new house in the same manner, style, or shape as the old building. (*Low v. Innes*, 4 De G., J. & S. 286.)

Covenant to rebuild;

A covenant to build private houses only, of a minimum value, on certain plots of land, was held not to be broken by the covenantor, who had purchased six lots and thrown them together, erecting a house of much greater value than the covenant contemplated, and erecting on one of the plots a stable of such dimensions and in such a position that it would still be possible to erect a house of the stipulated value upon the plot (*Russell v. Baber*, 18 W. R. 1021); for a stable may be considered as part of, and for the better enjoyment of, the house contemplated by the covenant. Where there was a covenant that no house erected on any part of the plot of land should be of less value than 400*l.*, and the covenantor erected thereon two houses separately of less, but together of greater, value than 400*l.*, and, in consequence of objections by the local board, the two houses were thrown together by making a communication on the ground floor; the Court was of opinion that the building substantially formed two houses, and not one, and granted an injunction against the breach. (*Snow v. Whitehead*, 53 L. J., Ch. 885; 51 L. T. 253.)

to build houses of a minimum value;

A covenant to build to the satisfaction of the surveyor of the lessor imports that the lessee shall build in any event, and to the satisfaction of the surveyor, if the lessor appoint one, not that the appointment of a surveyor by the lessor is a condition precedent or concurrent (*Cannock v.*

to build to the satisfaction of lessor's surveyor.

Jones, 3 Ex. 233; 18 L. J., Ex. 204); but where the covenant is to build according to the directions of the lessor's surveyor, the appointment of the surveyor and directions by him are conditions precedent to liability under the covenant. (*Coombe v. Greene*, 11 M. & W. 480; *Hunt v. Bishop*, 22 L. J., Ex. 337.)

Remedies for
breach of
building
covenants.

The remedy of the lessor for breaches of building stipulations may be by proceedings to enforce their specific observance by a claim for damages, or by re-entry for breach of covenant.

Specific
performance.

The performance of an affirmative covenant is enforced by a judgment for specific performance; that of a negative covenant by an injunction. Although the Court will not as a rule specifically enforce a contract to build or repair, it will do so in a case where the contract is in its nature defined. (*Hepburn v. Leather*, 50 L. T. 660; *City of London v. Nash*, 3 Atk. 515; *Cubitt v. Smith*, 10 Jur., N. S. 1123; *Mosely v. Virgin*, 3 Ves. 184; Fry, 45. In *Wigsell v. School for Indigent Blind*, 8 Q. B. D. 357; 51 L. J., Q. B. 330, the Court assumed that the facts would have justified a judgment for specific performance.) And, where an agreement for a lease contains a stipulation by the intending lessee to build, the Court can grant specific performance of the agreement to take a lease and give damages for breach of the agreement to build. (*Soames v. Edge*, Johns. 669; *Mayor, &c. of London v. Southgate*, 38 L. J., Ch. 141; *Kay v. Johnson*, 2 H. & M. 118; *ante*, p. 137.)

Injunction—

in case of
negative
covenants;

An injunction will not be granted to restrain a breach of a covenant which is too vague. (*Armstrong v. Courtney*, 15 Ir. Ch. R. 138.) But if a covenant or agreement is in its terms negative, and its construction is clear, the Court has no discretion, but must grant the injunction. (*Doherty v. Allman*, 3 App. Cas. 709; 39 L. T. 129; 26 W. R. 513.) It is not a question of damages or injury, but the mere circumstance of the breach entitles the covenantee to this specific performance by the Court of the negative bargain (*ib.*; *Tipping v. Eckersley*, 2 K. & J. 264), including, if necessary, a mandatory injunction. (*Lord Manners v. Johnson*, 1 Ch. D. 673; 45 L. J., Ch. 404.) The Court may interfere to prevent a threatened breach if the defendant claims and insists upon a right to do the act (*Tipping v. Eckersley*, *supra*), and may grant an interlocutory injunction. (*Wilkinson v. Rogers*, 12 W. R. 284.)

But the Court must be satisfied that a breach is intended. (*Worsley v. Suann*, 51 L. J., Ch. 576.)

A covenant which is affirmative in form often involves a negative in substance, and in such a case the Court may by injunction restrain that being done which would be a departure from and a violation of the covenant. (*Doherty v. Allman*, *supra*.) In such a case, although the Court cannot compel the defendant to do the thing he agreed to do, it can restrain him from doing something different from that which he contracted to do. (*Seawell v. Webster*, 7 W. R. 691; 29 L. J., Ch. 71; *Lumley v. Wagner*, 1 De G., M. & G. 604; *Peto v. Brighton, Uckfield, &c., Rail. Co.*, 1 H. & M. 468; 32 L. J., Ch. 677; *Leech v. Schweder*, L. R., 9 Ch. App. 465, n.; 43 L. J., Ch. 487; *Clegg v. Hands*, 62 L. T. 502; but see *Whitwood Chemical Co. v. Hardman*, 39 W. R. 433.) Thus, where a lessee covenanted to erect houses of a stipulated value, he was restrained from erecting houses of a less value. (*Snow v. Whitehead*, 53 L. J., Ch. 885; 51 L. T. 253; but see *Kilbey v. Haviland*, 19 W. R. 698.) The Court will not, however, restrain a breach of an affirmative covenant if by so doing the damage to the defendant would be very much greater than any possible advantage to the plaintiff, or if the injury is not one which, when done, cannot be remedied or compensated for by the payment of damages. (*Doherty v. Allman*, 3 App. Cas. 709.)

in case of
affirmative
covenants.

As to the persons entitled to enforce restrictive covenants, see sect. 5, *infra*.

If instead of seeking specific performance of the contract the plaintiff elects to bring an action for damages, "the rule in such a case, stated in its most general terms, is, that the plaintiff is entitled to have the damages assessed at the pecuniary amount of the difference between the state of the plaintiff upon the breach of the contract and what it would have been if the contract had been performed." (*Wigsell v. School for Indigent Blind*, 8 Q. B. D. 357; 51 L. J., Q. B. 330.) Thus, if a tenant covenant to build a house or wall, the damages upon a breach is not the cost of erecting the house or wall, but the loss sustained by the plaintiff through the diminished value of the premises in consequence of its non-erection. (*Ib.*) It is obvious that, in the majority of cases, a claim for damages is a very inadequate remedy for non-observance of building stipulations.

Measure of
damages.

Building
covenant
discharged by
statutory bar
to its per-
formance.

If a lessee enter into a covenant to build or not to build, and its performance is rendered impossible by an act of the legislature subsequent to the contract, the covenantor is discharged. (*Baily v. De Crespigny*, L. R., 4 Q. B. 180; 38 L. J., Q. B. 98; *Doe v. Rugeley*, 13 L. J., M. C. 137; 6 Q. B. 107.)

SECT. 5.—Repairs.

Tenant's
implied
undertaking
to repair,

In the absence of any express stipulation, there results from the relationship of landlord and tenant an implied undertaking on the part of the tenant to use the property demised in a tenant-like manner—doing proper repairs, the extent of which will depend upon the nature of his tenancy.

as tenant from
year to year,

The implied obligation of a tenant from year to year is to keep the premises wind and water tight (*Auworth v. Johnson*, 5 C. & P. 239; *Leach v. Thomas*, 7 C. & P. 327), and to make fair and tenantable repairs (*Cheetham v. Hampson*, 4 T. R. 318; *Gregory v. Mighell*, 18 Ves. 331), as by putting fences in order, or replacing windows or doors that are broken during his occupation, or cleansing drains and sewers. (*Russell v. Shenton*, 3 Q. B. 449.) He is liable if he omit to adopt reasonable and usual precautions to obviate the occurrence of great and manifest injury to the premises; thus, if a window or tile were accidentally broken, he would be liable if he did not repair it, provided the plain consequence of his neglect would be a serious damage to the house from wet or the like. (Chit. Cont. 316, 11th ed.) But he is not answerable for the mere wear and tear of the premises (*Torriano v. Young*, 6 C. & P. 8), nor answerable if they are burnt down, nor bound to rebuild if they become ruinous by any other accident (*Horsefall v. Mather*, Holt, N. P. 7), nor to replace doors and sashes worn out by time, to put a new roof on, or to make similar substantial and lasting repairs (*Ferguson v. —*, 2 Esp. 590), or do what are called general repairs.

as tenant for
years.

The obligation to repair of a tenant for a term of years independently of contract has never been clearly defined, as the question seldom arises in practice, since leases for years usually contain an express covenant to repair. Being liable for permissive waste (*Yellowly v. Gower*, 11 Ex. 274;

Davies v. Davies, 58 L. T. 514; 38 Ch. D. 499), his duty would seem to be to make such timely reparations as would enable him to give up the premises in the same tenantable condition as when he entered upon them, allowance being made for the natural decay of time. For this purpose, and to prevent them becoming ruinous, it might be his duty to replace principal rafters and timbers; to supply new window and door frames; to repair the main walls, and to do other like substantial repairs. But he would not be liable to make good any injuries resulting from extraordinary causes, as the act of God by storm or flood. Neither would he be responsible for destruction by accidental fire, since it is provided by 14 Geo. 3, c. 78, s. 86, that "no action, suit or process whatsoever shall be maintained against any person in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall accidentally begin; nor shall any recompense be made by such person for any damage suffered thereby, any law, usage, or custom to the contrary notwithstanding: provided that no contract or agreement made between landlord or tenant shall be hereby defeated or made void." By accidental fire is meant one not traceable to any cause, and does not include wilful fires or those caused by negligence. (*Filliter v. Phippard*, 17 L. J., Q. B. 89; 11 Q. B. 347.)

In case of accidental fire.

In the absence of a contract to do repairs, the tenant takes the premises as they stand, and there is no obligation on the part of a landlord to put premises into a habitable condition (*Chappell v. Gregory*, 34 Beav. 250), or to do any repairs whatever upon them (*Gott v. Gandy*, 23 L. J., Q. B. 1; 2 E. & B. 845), though by neglecting to do so they become uninhabitable. (*Arden v. Pullen*, 10 M. & W. 321.) Neither is there any implied covenant by the lessor of two adjoining houses—the occupiers of which are under covenant to repair—that he will keep either house in such state as to enable the covenants with respect to the other to be performed. (*Colebeck v. Girdlers' Co.*, 45 L. J., Q. B. 225; 1 Q. B. D. 234.) A landlord is not bound to rebuild in case of destruction by fire (*Pindar v. Ainsley*, cited 1 T. R. 312), though he may have covenanted for quiet enjoyment. (*Brown v. Quilter*, Amb. 619.) In fact, the landlord has no right to go upon the premises if he desire to make repairs (*Barker v. Barker*, 3 C. & P. 557), and if he do so in the absence of an express power in the

No implied obligation for landlord to repair.

lease, he will be guilty of a trespass, and may be restrained by injunction, although the non-repair may cause a forfeiture of his own lease. (*Stocker v. Planet Building Society*, 27 W. R. 793, 877.) Where the owner and occupier of a building lets only a portion of it, there would seem, notwithstanding some cases of doubtful authority to the contrary, to be no implied undertaking on the part of the landlord to keep the other portions of the building in a proper state of repair. (*Carstairs v. Taylor*, 6 Ex. 217; 40 L. J., Ex. 129; and see *Ross v. Feddon*, L. R., 7 Q. B. 661; 41 L. J., Q. B. 270; *Pomfret v. Ricroft*, 1 Wms. Saund. 557, n. (i), 1871 ed.) And where there is a lease of premises, and an easement over other premises, there is no liability on the part of the lessor to repair the premises over which the easement is granted. Thus, where a house was demised with the use of a pump, it was held that, though the lessee might repair the pump, he could not maintain an action against the lessor for not repairing it. (*Pomfret v. Ricroft*, *supra*.)

Covenant to
repair,

A lease generally contains an express covenant to repair, usually to be performed by the tenant. Such covenants vary with the ingenuity of the draftsmen, and the construction of each must depend upon its particular terms. In some cases, it is a simple covenant to repair, and in others the additional obligation to put in repair, keep in repair, or yield up in repair, is imposed. Besides the general covenant for tenantable repairs, there are often independent covenants for decorative repairs, such as painting, papering, and colour-washing.

in a lease
under a
power,

A lease under a power to grant leases, "so that the demise be made without impeachment of waste," is invalid if it contain a covenant by the lessor to repair (*Yellowly v. Gower*, 24 L. J., Ex. 289), or a covenant by the lessee to repair, "fair wear and tear and damage by tempest excepted." (*Davies v. Davies*, 38 Ch. D. 499.)

as from when
it operates;

The liability under a covenant to repair in a present demise, commences from the execution of the lease. The lessee is not liable for any prior dilapidations, though they may have occurred since the date fixed by the habendum as the commencement of the term. (*Shaw v. Kay*, 1 Ex. 412; 17 L. J., Ex. 17.) In a demise as from a future date, the liability runs from the commencement of the tenancy; and in such a case, an undertaking to leave premises in the same state as they *now* are, is taken to

mean as they shall be at the date fixed for the tenant's entry. (*White v. Nicholson*, 11 L. J., C. P. 264; 4 M. & Gr. 95.)

Under an express covenant to repair, the lessee remains liable during the whole term, notwithstanding he assign his interest. (*Brett v. Cumberland*, Cro. Jac. 521.) Even when the premises are taken compulsorily by a public body, the liability continues until possession is given up. (*Mills v. East London Union, L. R.*, 8 C. P. 79; 42 L. J., C. P. 46.)

duration of
liability
under,

The eviction of the tenant from a part of the premises, even by the landlord himself, does not relieve the tenant from his liability under the covenant to repair, or the performance of any of his covenants other than that for the payment of rent (*Newton v. Allin*, 1 Q. B. 518; 10 L. J., Q. B. 179), even though he relinquish possession of the rest of the premises. (*Morrison v. Chadwick*, 18 L. J., C. P. 189; 7 C. B. 266.)

in case of
tenant's
eviction;

A tenant holding over after the expiration of his term under an implied tenancy from year to year continues liable under the covenant to repair. (*Ecclesiastical Commissioners v. Merral*, L. R., 4 Ex. 162; 38 L. J., Ex. 93; *Ponsford v. Abbot*, Cab. & E. 225.)

in case of
tenant hold-
ing over;

A covenant to repair runs with the land, and binds an assignee, though "assigns" are not named in the covenant (*Spencer's case*, 1 Sm. L. C. 65, 9th ed.), and so does a covenant to put in repair (*Martyn v. Clue*, 22 L. J., Q. B. 147; 18 Q. B. 661), and a covenant to yield up in good repair. (*Ib.*) A covenant to repair does not run with the land as against a person who, under the Statute of Limitations, acquires a right to the term as against the tenant. (*Tichborne v. Weir*, 67 L. T. 735.)

runs with the
land.

An assignee of the reversion may sue upon the covenant if the premises continue ruinous in his time, although they became so before the assignment to him. (*Mascal's case*, 1 Leon. 62.)

A covenant to repair imports simply an obligation to prevent waste (*Doe v. Jones*, 4 B. & Ad. 128, *per* Parke, J.) and dilapidation, and make good any defects not resulting from the reasonable wear and tear of the demised premises, or the natural deterioration of the materials employed in the construction of the fabric. Even in the case of a covenant to leave a house in the same state as at the time of making the lease, ordinary and natural decay is no

Covenant to
repair,
defined;

breach. (1 Shep. Touch. 169.) And it is doubtful whether the words frequently added to the covenant to yield up in good repair, "fair" or "reasonable" wear excepted, are not superfluous as being implied, though *Wright v. Goddard* (8 A. & E. 144) seems to be an authority for the view that "reasonable use and wear thereof only excepted" have some qualifying force.

does not
involve im-
provements,

The covenant does not involve making alterations or improvements. (*Truscott v. Diamond Rock Boring Co.*, 20 Ch. D. 251; 51 L. J., Ch. 259.) Thus, a tenant who has covenanted to repair a house is not liable for the cost of laying a new floor on an improved plan (*Soward v. Leggatt*, 7 C. & P. 613; *Proudfoot v. Hart*, 25 Q. B. D. 55); or putting on a new roof to an old house, although necessary to prevent leakage. (*Weir v. Preedy*, 67 L. T. Jour. 395.) Nor does an agreement to keep drains in repair extend to the rectification of a structural defect, but is confined to keeping in repair the drains as they existed. (*Huggall v. McKean*, Cab. & E. 391; *Lyon v. Greenhow*, 8 Times L. R. 457.)

or renewal of
old premises,

A covenant to repair is to sustain and uphold (*Auworth v. Johnson*, 5 C. & P. 241), not to renew or rebuild. (*Gutteridge v. Munyard*, 1 M. & Rob. 334.) Thus, in regard to the woodwork, when it can be kept in repair by repairing a piece of a door or anything of that sort, the tenant is bound to do it, but is not bound to put in new woodwork. (*Crawford v. Newton*, 36 W. R. 54, *per* Cave, J.) In *Proudfoot v. Hart* (25 Q. B. D. 42; 59 L. J., Q. B. 389), the Court of Appeal, extending the principle of the last case, held that if a floor or other woodwork becomes perfectly rotten, or in such a state that patching will not put it in repair, the tenant must put down a new floor or other woodwork. And, as we shall presently see, the very act of repairing will, in case the building be destroyed, involve rebuilding. But in such a case the damages for breach of covenant would not be the full cost of the new building. (*Yates v. Dunster*, 11 Ex. 15; 24 L. J. 226; and see *infra*, p. 191.)

or liability for
latent defects.

A covenant to repair does not make the tenant liable for injury resulting from latent faults and defects in the property demised. (*Manchester Bonded Warehouse Co. v. Carr*, 5 C. P. D. 507; 49 L. J., C. P. 809.)

Construction
of the cove-
nant,

The construction of a covenant to repair is relative, being controlled by the character and class of the premises, their

age and state of repair, and their locality. (*Mantz v. Goring*, 4 Bing. N. C. 451; *Payne v. Haine*, 16 M. & W. 545; *Haldane v. Newcomb*, 12 W. R. 135.)

Therefore, regard must be had to the condition of the premises when the covenant begins to operate (*Walker v. Hatton*, 10 M. & W. 258), and its effect will differ as the premises are at that time old or new, in good repair, or dilapidated. The covenants in a lease, and in an underlease granted after a lapse of years, of the same premises, though identical in terms, impose a different obligation. If there were a lease of a new house for a hundred years, with a general covenant to repair, and at the end of fifty years a person take an underlease in the same words, the latter covenant must be construed with reference to the state of the premises at its date. (*Walker v. Hatton*, 10 M. & W. 257, *per Parke*, B.; *Penley v. Watts*, 7 M. & W. 601; *Logan v. Hall*, 4 C. B. 598; 16 L. J., C. P. 252; *Pontifex v. Foord*, 53 L. J., Q. B. 321; 12 Q. B. D. 152.) If the house be old, it is to be kept in repair as such. (*Harris v. Jones*, 1 M. & Rob. 173; *Scales v. Lawrence*, 2 F. & F. 289.) The old building is not to be restored in a renewed form at the end of the term, or of greater value than it was at the commencement. The lessee is not responsible for such dilapidations as result from the natural operation of time and the elements; but he is bound, by the timely expenditure of money and care, to keep it as nearly as possible in the same condition as when it was demised. (*Gutteridge v. Munyard*, 1 M. & Rob. 334; 7 C. & P. 129.)

controlled by
the age and
state of pro-
perty,

The question in such cases is, whether the premises have been kept in substantial repair as opposed to claims for fancied injuries, such as a mere crack in a pane of glass or the like. (*Stanley v. Tougood*, 3 Bing. N. C. 4; *Harris v. Jones*, 1 M. & Rob. 173.)

In an action upon a covenant to repair, the tenant may give evidence as to the general state the premises were in at the time of the demise (*Burdett v. Withers*, 7 A. & E. 136; *Mantz v. Goring*, 4 Bing. N. C. 451); but it is not competent for him to show in detail what parts were out of repair. (*Ib.*; *Payne v. Haine*, 16 M. & W. 545.)

of which
evidence may
be given.

A covenant to repair is also controlled by the class and locality of the premises. Thus, a house in Spitalfields may be repaired with materials inferior to those requisite for repairing a mansion in Grosvenor Square. (*Payne v. Haine*,

The class and
locality of the
premises.

16 M. & W. 545, *per* Parke, B.) But the fact that a neighbourhood has deteriorated since the date of a lease, does not justify the doing of repairs at a cheaper rate, or of an inferior quality to that originally contemplated by the lease. (*Morgan v. Hardy*, 17 Q. B. D. 770; 35 W. R. 254, 588.)

“Good,”
“tenantable,”
&c. repair.

The covenant to repair is often expressed as to keep in “good” (*Payne v. Haine, supra*), “tenantable” (*Stanley v. Towgood*, 3 Bing. N. C. 4), “habitable” (*Belcher v. McIntosh*, 2 M. & Rob. 186), or “substantial” repair; or to do “necessary repairs.” (*Truscott v. Diamond Rock Boring Co.*, 20 Ch. D. 251; 51 L. J., Ch. 259; *Easton v. Pratt*, 2 H. & C. 676; 33 L. J., Ex. 233.) None of these expressions have any technical meaning, and do not seem to add anything to the word repair. In *Crauford v. Newton* (36 W. R. 54), Cave, J., treated “tenantable repair” as having no wider meaning than repair; and the Court of Appeal did not consider it necessary for the purposes of their decision to define “tenantable repair.” But in *Proudfoot v. Hart* (38 W. R. 730; 25 Q. B. D. 42), the Court defined “good tenantable repair” as “such repair as, having regard to the age, the character, and the locality of the premises, would make them reasonably fit for the occupation of a reasonably minded man of the class who would be likely to want such a house.”

Covenant to
put in repair,

If a tenant covenant to “put” premises into habitable repair, this obviously means better repair than when he found them, and binds him to put them into a state that they may be occupied, not only with safety but with reasonable comfort for the purpose for which they are taken. (*Belcher v. McIntosh*, 2 M. & Rob. 186.) A covenant “to do necessary repairs” involves putting the premises into repair in the first instance. (*Truscott v. Diamond Rock Boring Co.*, 20 Ch. D. 251; 51 L. J., Ch. 259.) A covenant to put premises into repair “forthwith,” does not signify that it is to be done within any specific time, but with reasonable celerity, which is a matter of fact for a jury. (*Doe v. Sutton*, 9 C. & P. 706.)

When in-
volved in
covenant to
keep in repair.

Sometimes a covenant to keep in repair involves the obligation to put in repair. If at the time of demise the premises are old and out of repair, and the tenant agree to keep and deliver up the same in good repair, he is bound to put them in repair as old premises, for he cannot “keep” without putting them in repair, and he is not justified in

keeping them in bad repair because he found them so. (*Payne v. Haine*, 16 M. & W. 541; *Easton v. Pratt*, 2 H. & C. 676; *Saner v. Bilton*, 47 L. J., Ch. 267; 7 Ch. D. 815; *Proudfoot v. Hart*, 25 Q. B. D. 42.)

Under a covenant to repair, a tenant is not bound to do anything in the nature of decorative repair. (*Wise v. Metcalfe*, 10 B. & C. 312, 314, *per* Bayley, J.) And, applying this rule, it was held that he is not bound to do any papering though the old ones become useless, and as to painting, which is partly for decoration and also for the protection of the woodwork, the tenant is bound to paint so far as is required for the latter purpose, but not to do any purely decorative painting. (*Crawford v. Newton*, 36 W. R. 54.) But in a later case (*Proudfoot v. Hart*, 25 Q. B. D. 42; 63 L. T. 171), it was held that while, generally speaking, the tenant would not be bound to re-paper or re-paint, yet if the paint through lapse of time has worn off, or the paper has dropped off or worn out so that the condition is not such as to satisfy a reasonably minded tenant of the class who would be likely to take the house, he must re-paper and re-paint. By the light of these authorities, must be read the old case of *Monk v. Noyes* (1 C. & P. 265), in which Abbot, C. J., laid down that under a covenant to "substantially repair, uphold, and maintain" a house, the tenant was bound to "keep up the painting of inner doors, inside shutters," &c., and the case of *Scales v. Lawrence* (2 F. & F. 289), in which the covenant being "well and sufficiently to repair, uphold, sustain, paint, and cleanse, and keep and leave in such repair, reasonable wear and tear excepted," Willes, J., held that papering was not included in the covenant, and that the utmost that could be recovered was the cost of replacing such portions as might be absolutely torn off, and as to the painting it having been proved that the house had been painted at customary intervals, the tenant was only bound, in addition to the repair of actual dilapidation, to clean the old paint on leaving, and not to re-paint. (And see *Moxon v. Townshend*, 2 Times L. R. 717; 3 *ibid.* 392.)

Repair does not include decoration. Painting and papering.

A covenant to keep in repair premises which include ornamental water, would only bind the covenantor to keep the water from bursting its banks, or to keep its sluices in working order, and not to cleanse it. (*Bird v. Elwes*, 37 L. J., Ex. 91; L. R., 3 Ex. 225; *Dashwood v. Magniac*, 64 L. T. 99.)

Repairing as applied to ornamental water.

Meaning of particular expressions.

A covenant to repair the "external parts" of a house includes its boundary walls, though they are party walls not exposed to the atmosphere. (*Green v. Eales*, 2 Q. B. 225; 11 L. J., Q. B. 63.) A covenant to do external repairs includes the mending of broken windows, as being part of the skin of the house. (*Ball v. Plummer*, 23 Sol. J. 656.)

Iron beams have been held to be "main timbers" within a covenant to repair. (*Manchester Bonded Warehouse Co. v. Carr*, 5 C. P. D. 507; 49 L. J., C. P. 809.) In a demise of a salt spring, with a covenant to leave the "works" erected or set up on the premises in good repair, it was held that salt pans, merely resting by their own weight, were "works" so erected or set up. (*Mansfield v. Blackburne*, 6 Bing. N. C. 426.)

What are "buildings," &c. within the covenant.

"Erections and buildings" in a covenant to yield up in repair include those erected for the purpose of trade and by law removable as tenant's fixtures, but do not include something merely resting on the soil (*Naylor v. Collinge*, 1 Taunt. 19), and the word "erections," coming after houses in a covenant, was construed as *ejusdem generis*, and held not to apply to a fence which was not permanent. (*Borgnis v. Edwards*, 2 F. & F. 111.) But "erections" may include trade fixtures (*Bidder v. Trinidad Petroleum Co.*, 17 W. R. 153); "improvements" fixed to the land include articles so fixed, which, apart from the covenant, the tenant would be entitled by custom to remove (*Martyr v. Bradley*, 9 Bing. 24); and "erections and improvements" made or set up on the premises, include structures which are not fixed to the soil. (*West v. Blakeway*, 2 M. & Gr. 729; 10 L. J., C. P. 173.) And we have seen (*ante*, p. 81) that the words "messuage," "house," and "building" have a wider meaning in law than their generally accepted signification. Where there was a covenant to repair buildings, and the breach alleged was non-repair of a pavement in the court, it was held to be *quasi* the building, and within the intention of the covenant. (*Pyot v. Lady St. John*, Cro. Jac. 329.) A covenant to repair "messuages and buildings" was held to include the mill wheel of a water mill. (*Openshaw v. Evans*, 50 L. T. 156.) And a covenant to repair buildings extends not only to buildings, but to fixtures which the tenant is not allowed to remove (*Thresher v. East London Waterworks Co.*, 2 B. & C. 608; *Dean v. Allalley*, 3 Esp. 11); and the covenant is broken

Fixtures, part of buildings.

by the removal of such fixtures at the end of the term. (*Penry v. Brown*, 2 Stark. 403.) A covenant to repair existing premises and fixtures would include substituted fixtures. (*Sunderland v. Newton*, 3 Sim. 450.) The mere removal and sale by a tenant during the term of fixtures which he does not immediately replace, but which can be replaced before the end of the term, is not in itself a breach of his covenant to repair and uphold the demised premises and deliver up the same at the end of the term, together with all things affixed; though it is possible they may be removed in such a way as to amount to non-repair. (*Doe v. Davis*, 15 Jur. 155.)

A general covenant to repair and keep and leave in repair extends to all buildings erected on the demised premises during the term (*Douse v. Earle*, 3 Lev. 264; *Cornish v. Cleife*, 34 L. J., Ex. 22, *per* Channell, B.); *d fortiori* where the covenant is to repair "buildings erected, or to be erected" (*Hudson v. Williams*, 39 L. T. 632); but where there is a particular covenant to repair *the buildings demised*, this does not extend to distinct newly-erected buildings (*Cornish v. Cleife*, 34 L. J., Ex. 19; 3 H. & C. 446; *Doe v. Rowlands*, 9 C. & P. 734); unless the new erection is made part of the old. (*Cornish v. Cleife*, *supra*, *per* Bramwell, B.) A general covenant to repair all buildings then standing or to be erected during the term, was held to extend to buildings erected on the waste lands of the landlord not included in the lease, the Court implying a contract that the encroachment of the tenant was to be upon the terms of the original lease. (*White v. Wakley*, 26 Beav. 17; 28 L. J., Ch. 77.)

Existing and after-erected buildings within the covenant.

On the other hand, a covenant to repair in a building lease, which contemplates the pulling down of the existing and the erection of new buildings, may be construed as limited to the buildings to be erected. (*Lant v. Norris*, 1 Burr. 287.)

Where a lessee of land, with houses thereon in course of erection, covenanted to complete the erection in two months, and also to keep them in repair during the term, his permitting the carcasses to become dilapidated, was held to be a breach of the covenant to repair, though the houses were never finished. (*Bennett v. Herring*, 3 C. B., N. S. 370; 6 W. R. 37.)

A covenant to do repairs to the satisfaction of the landlord's surveyor is complied with if the repairs done are of

Repairing to satisfaction of surveyor.

such a character that the surveyor ought reasonably to have been satisfied therewith. (*Doe v. Jones*, 2 C. & K. 743.)

Where a covenant to repair has been broken, it is no answer to an action by the landlord that the tenant has employed persons to repair. (*Nokes v. Gibbon*, 3 Drew. 681; 26 L. J., Ch. 433.)

Covenant
broken by
alterations;

A covenant to repair is broken not only by allowing dilapidations, but also by alterations which change the character of the premises, unless the lease contemplated such alterations. Thus, opening a door through the wall, either within the house itself or into an adjoining house, is a breach, and keeping it open is a continuing breach. (*Doe v. Jackson*, 2 Stark. 293; *Gange v. Lockwood*, 2 F. & F. 115; *Borgnis v. Edwards*, *ib.* 111.) In *Elliott v. Watkins* ((1835), 1 Jones, 308), the Irish Court of Exchequer held that a covenant to keep in repair a dwelling-house and all improvements was broken by taking away the partition walls, removing the stairs, and converting the house into a shop, though the value was thereby increased; but in *Doe v. Jones* (4 B. & Ad. 126), similar alterations were held not to be a breach, as the terms of the lease implied that additions and improvements were to be made.

by pulling
down.

Pulling down a building, even for the purpose of rebuilding it, is a breach of a covenant to keep in repair, or "to repair, uphold, and maintain." (*Gange v. Lockwood*, *supra.*) So is pulling down a wall dividing a front from a side courtyard. (*Doe v. Bird*, 6 C. & P. 195.) But if the lease contain no negative covenant, prohibiting pulling down for the purpose of re-erecting, it will not be restrained by injunction. (*Re McIntosh and Pontypridd Improvement Co.*, 61 L. J., Q. B. 164; *Doherty v. Allman*, 3 App. Ca. 709; 26 W. R. 513; 39 L. T. 129.) And pulling down is not a breach of a covenant to leave in repair; for the tenant may rebuild before the end of his tenancy, and thus comply with the covenant. (Shep. Touch. 174.)

Unqualified
covenant to
repair binds
covenantor to
rebuild in
case of de-
struction.

A covenant without qualification to repair and keep in repair buildings, binds the covenantor to rebuild the premises in case they are destroyed, whether the injury proceed from the act of a stranger (*Green v. Eales*, 2 Q. B. 225; 11 L. J., Q. B. 63), by accidental fire, lightning or tempest (*Walton v. Waterhouse*, 2 Wms. Saund. 420; *Bullock v. Dommitt*, 6 T. R. 650; *Pym v. Blackburn*, 3 Ves. 34; *Marshall v. Schofield*, 31 W. R. 134; 52 L. J., Q. B. 58; *Clark v. Glasgow Assurance Co.*, 1 Macq. 668);

and if he has also covenanted to insure to a certain amount, his liability to repair is not limited to that amount. (*Digby v. Atkinson*, 4 Camp. 275.) If the lessor has insured, he will not be compelled to contribute the insurance money to the rebuilding of the premises, or be restrained from suing for his rent until they are rebuilt. (*Leeds v. Cheetham*, 1 Sim. 146; *Lofft v. Dennis*, 1 E. & E. 474; 28 L. J., Q. B. 168.) But a policy of insurance is only a contract of indemnity, and if, in case of a fire, the tenant under his covenant to repair restores the property, the landlord can recover nothing under his policy of insurance. (*Darrell v. Tibbits*, 5 Q. B. D. 560; 50 L. J., Q. B. 33; *Castellain v. Preston*, 11 Q. B. D. 380; 52 L. J., Q. B. 366.) And an insurance office may, upon any grounds of suspicion that the persons effecting the insurance have been guilty of fraud or incendiarism, cause the insurance money to be laid out in rebuilding. (14 Geo. 3, c. 78, s. 83; *Ex parte Gorely*, 34 L. J., Bkey. 1.) But to entitle the landlord to have the insurance money applied in rebuilding the premises, he must make a distinct request to that effect to the insurance office, before they have settled with the tenant. (*Simpson v. Scottish Union Insurance Co.*, 32 L. J., Ch. 329; 1 H. & M. 618.)

If the tenant instead of repairing leaves the landlord to his action the damages will not be the entire cost of rebuilding, but that amount less the difference between the value of the new house and the old one. (*Yates v. Dunster*, 11 Ex. 15; 24 L. J., Ex. 226.)

Damages in case of failure to rebuild.

It is usual to insert in leases a proviso relieving the tenant from liability to repair in case of fire or other inevitable accident. But this does not bind the lessor to repair (*Weigall v. Waters*, 6 T. R. 488), or release the lessee from payment of rent (*Monk v. Cooper*, 2 Stra. 763), which must be paid, whether or not there is any liability to repair, or any beneficial occupation. (*Holtzapffel v. Baker*, 18 Ves. 115; *Izon v. Gorton*, 5 Bing. N. C. 501; *Marshall v. Schofield*, 31 W. R. 134; 52 L. J., Q. B. 58.) Sometimes a clause is inserted suspending the rent in the event of the premises being burnt or damaged by inevitable accident; this does not include damage from the mode of using the premises. (*Saner v. Bilton*, 7 Ch. D. 815; 47 L. J., Ch. 267; *Manchester Bonded Warehouse Co. v. Carr*, 5 C. P. D. 507; 49 L. J., C. P. 809.)

Lessee must pay rent notwithstanding no occupation.

A covenant or agreement by the tenant to repair is Covenant

subject to
condition
precedent.

often coupled with a reference to some act to be done by the landlord, which not infrequently raises a question as to whether the performance of such act is a condition precedent to the tenant's liability, or is only a stipulation creating an independent obligation on the part of the landlord. The distinction is important and the classification not always easy. (*Ante*, p. 103.) A covenant by the tenant to keep a house in repair "from and after" the landlord has repaired is conditional, and the landlord must repair before the tenant is liable, even though the house was in good repair at the time of the demise. (*Slater v. Stone*, Cro. Jac. 645.) Under a covenant by the tenant to keep the premises in repair, "the same being first put" into repair by the landlord, the whole of the premises must be put into repair before the tenant becomes liable to repair any part. (*Neale v. Ratcliff*, 15 Q. B. 916; 20 L. J., Q. B. 130; *Coward v. Gregory*, 36 L. J., C. P. 1; L. R., 2 C. P. 153.) In a lease of a farm, the tenant covenanted to repair the windows, hedges, ditches, fences, and fixtures, "the farm house and buildings being previously put and kept in repair." The Court was of opinion that if the words "kept in repair" had been omitted, a condition precedent might have been created, but with those words it would not, but held nevertheless that the clause created an absolute covenant on the part of the landlord to repair the buildings. (*Cannock v. Jones*, 3 Ex. 233; 18 L. J., Ex. 204.) In *Bragg v. Nightingale* (Sty. 140), the lessor covenanted to repair the house demised by a given day, and the lessee covenanted that from that time until the end of the term he would repair and leave in repair; the Court was divided in opinion as to whether a condition precedent was created or reciprocal covenants. The latter construction would obtain at the present day.

An agreement for a lease, with repairing covenants, of a new house, implies a covenant by the landlord to finish and deliver the house in a proper state of repair, the performance of which is a condition precedent to the tenant's liability to accept a lease. (*Tildesley v. Clarkson*, 31 L. J., Ch. 362; and see *Tidey v. Mollett*, 33 L. J., C. P. 235; 16 C. B., N. S. 298.)

If the tenant covenant to repair, "being allowed" the whole or a certain class of the materials by the landlord, his liability is conditional upon the landlord being ready and willing to supply the necessary materials. (*Thomas v.*

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& W. 480), but a covenant to repair
 the lessor's surveyor is an absolute
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 (*Cannock v. Jones*, 3 Ex. 233; 18
 p. 177.)

Where the covenant is to repair
 does not become liable until the
 (*Horsefall v. Testar*, 7 Taunt. 385)
 covenant to repair generally, and
 repair after notice, the two are in
Gros, 4 C. B., N. S. 537), and the

to give the notice mentioned in the second covenant before suing on the general covenant. (*Wood v. Day*, 7 Taunt. 646.)

Notice under, when waiver of rights under general covenant to repair.

Where, however, the landlord does give the actual notice required by the second covenant it is equivalent to an admission that the tenancy will continue up to the expiration of that time, and although he may bring an action for damages before the notice has expired, he cannot insist on the forfeiture and proceed by ejectment until it has expired. (*Doe v. Meux*, 4 B. & C. 606.) Thus, where there was a general covenant to repair, and the second covenant was to repair after three months' notice, and the landlord gave notice to repair *within three months*, he was held, in an action of ejectment for breach of the general covenant to repair, to have waived the forfeiture under the general covenant. (*Ib.*) And where there was a covenant to repair generally, and a further covenant that the landlord might, in case of non-repair, give notice to repair, and, if it should not be done for two months, perform it himself and distrain upon the tenant for the expense, it was held that by giving notice under this latter proviso the landlord waived his rights under the general covenant. (*Doe v. Lewis*, 5 A. & E. 277.) But no such waiver would be caused by a notice to repair generally or to repair "forthwith" (*Roe v. Paine*, 2 Camp. 520), or "in accordance with the covenants" (*Few v. Perkins*, 36 L. J., Ex. 54; L. R., 2 Ex. 92), or by a notice given to satisfy the requirements of sect. 14 of the Conveyancing Act, 1881. (*Cove v. Smith*, 2 Times, L. R. 778.)

If after a notice to repair the lessee enters into negotiations to sell his interest to the lessor the effect is to suspend the notice until the negotiations are broken off. (*Hughes v. Metropolitan Rail. Co.*, 2 App. Ca. 439; 46 L. J., C. P. 583.)

A covenant to repair during the term on three months' notice, and to leave in repair at the end of the term is divisible, and no notice is necessary to sue for non-repair at the end of the term. (*Harflet v. Butcher*, Cro. Jac. 644.)

Tenant liable to third persons for nuisance or damage,

The rule of law is that the occupier, and not the owner of premises, is *prima facie* liable for damages resulting from a nuisance arising upon the demised premises, or for injury to third persons or adjoining property from the same being in a ruinous or dangerous condition (*Coupland v. Hardingham*, 3 Camp. 398; *Russell v. Shenton*, 3 Q. B. 449;

Terry v. Ashton, 45 L. J., Q. B. 260; 1 Q. B. D. 314; *Broder v. Saillard*, 45 L. J., Ch. 414; 2 Ch. D. 692; *Humphreys v. Cousins*, 46 L. J., C. P. 438; 2 C. P. D. 239; *Firth v. Bowling Ironworks Co.*, 3 C. P. D. 254; 47 L. J., C. P. 358); although as between himself and the landlord he is not compellable to repair. (*Reg. v. Watson*, 2 Ld. Raym. 856.) There are only two ways in which a landlord can be made liable for injury to a stranger by the defective state of premises which are let to a tenant; first, when he has contracted with the tenant to repair; or, secondly, when he has let the premises in a ruinous and improper state. (*Nelson v. Liverpool Brewery Co.*, 2 C. P. D. 311; 46 L. J., C. P. 675; 25 W. R. 877; *Payne v. Rogers*, 2 H. Bl. 349; *Pretty v. Bickmore*, L. R., 8 C. P. 401; *Gwinnell v. Eamer*, 32 L. T., N. S. 835.) But if the tenant was under no obligation to repair, and the defect, to the knowledge of the landlord, existed at the time of letting, he would be liable (*Todd v. Flight*, 30 L. J., C. P. 21), though probably not if the tenant had covenanted to repair. (*Per Brett, J.*, *Gwinnell v. Eamer*, *supra*.) It was held by the Court of Queen's Bench that, if the tenant is not bound to repair, and the tenancy is one from year to year, the landlord is liable for damage caused by a permanent nuisance, if it be shown that since the nuisance, and before the damage, he might have determined the tenancy and did not; for to continue a yearly tenancy is equivalent to a re-letting at the end of each year. (*Gandy v. Jubber*, 33 L. J., Q. B. 151; 5 B. & S. 78.) This decision was practically overruled by the undelivered judgment of the Exchequer Chamber (9 B. & S. 15), which held it to have proceeded on a misapprehension, since a tenancy from year to year is not a re-letting at the commencement of every year, but a springing interest, which is only determined by a notice to quit. In a later case it was held that as no notice to quit is required in the case of a weekly tenancy, which is equivalent to a re-letting at the beginning of every week, if the premises are defective at the commencement of any week the landlord is liable. (*Sandford v. Clarke*, 57 L. J., Q. B. 507; 21 Q. B. D. 398.)

But a landlord by letting premises in a ruinous condition does not become liable for any damage to the tenant or his guests or customers. (*Robbins v. Jones*, 15 C. B., N. S. 240; *Norris v. Catmur*, Cab. & E. 576.)

unless the lease is an authority to create a nuisance.

If premises are let for a fixed and definite purpose, the landlord is liable for any nuisance that arises of necessity from the use of the premises as contemplated by the demise (*Harris v. James*, 45 L. J., Q. B. 545; 35 L. T., N. S. 240); but the landlord would not be liable for a nuisance created by a negligent use of the premises, if it appear that they might be used for the contemplated purposes of the demise without creating a nuisance. (*Rich v. Basterfield*, 4 C. B. 783; 16 L. J., C. P. 273.)

Covenant by landlord.

When a landlord covenants to repair the interior of demised premises, notice of want of repair (though not stipulated for) is necessary before he can be sued on his covenant. (*Makin v. Watkinson*, 40 L. J., Ex. 33; L. R., 6 Ex. 25; approved in *London & S. W. Rail. Co. v. Flower*, 45 L. J., C. P. 54; 1 C. P. D. 77; *Manchester Bonded Warehouse Co. v. Carr*, 5 C. P. D. 507; 49 L. J., C. P. 809; *Hugall v. M'Kean*, 33 W. R. 588; 53 L. T. 94.) Such a covenant carries with it a licence to the landlord to enter on the premises, and there remain for a reasonable time to do that which he contracted to do. (*Saner v. Bilton*, 47 L. J. Ch. 267; 7 Ch. D. 815.) If the landlord covenant to repair there is no implied condition that the tenant may quit or refuse to pay rent if the repairs are not done (*Surplice v. Farnsworth*, 7 M. & Gr. 576; 13 L. J., C. P. 215; *Hart v. Windsor*, 12 M. & W. 68, 84), or that he may do the repairs and deduct the amount from his rent. (*Weigall v. Waters*, 6 T. R. 488; 2 Platt, 215.) But a stipulation, in an agreement to take a lease from a certain day, that the landlord should complete certain repairs before an earlier day, was held to be a condition precedent to the liability to take the lease. (*Tidey v. Molllett*, 16 C. B., N. S. 298; 33 L. J., C. P. 235.) An agreement by the landlord to put premises into good tenantable repair, does not imply an obligation to put them into a condition suitable for any particular purpose for which, to his knowledge, the tenant intends to use them. (*McClure v. Little*, 19 L. T. 287.)

A covenant by the landlord to rebuild the premises in case of fire, and place the same in the state they were in before the fire, only makes him liable to rebuild what he let, and not any additions made by the tenant. (*Loader v. Kemp*, 2 C. & P. 375.)

When the tenant covenants to keep the inside of the premises in repair, and the landlord covenants to keep the

roofs, main walls and main timbers in good repair, the landlord is bound to rebuild premises which have fallen through being overloaded by the tenant, provided they were used for the purpose for which they were taken (*Saner v. Bilton*, 47 L. J., Ch. 267; 7 Ch. D. 815), and the mode and extent of the user were apparently proper, having regard to the nature of the property and what the tenant knew of it, or what, as an ordinary man of business, he ought to have known of it. (*Manchester Bonded Warehouse Co. v. Carr*, *supra*.) But if the damage or destruction were caused by the tenant using the premises in an unreasonable manner, the tenant would be liable as for waste. (*Ib.*)

A landlord's remedies for breach are either by action upon the covenant or agreement, or by re-entry for forfeiture, if the lease contains an express proviso for re-entry upon such a breach, but not otherwise. Remedies for non-repair.

As damages are usually a sufficient compensation for a breach of a covenant to repair (*City of London v. Nash*, 3 Atk. 512), the Courts will not order the specific performance of a general covenant to repair (*Hill v. Barclay*, 16 Ves. 405; *Paxton v. Newton*, 2 Sm. & G. 437; *Taylor v. Portington*, 7 De G. M. & G. 328), though it might in the case of specific and defined repairs. (*Hepburn v. Leather*, 50 L. T. 660.) Specific performance.

An injunction, however, may be granted to prevent a lessee from pulling down buildings, notwithstanding he is liable on his covenant to repair (*Mayor of London v. Hedger*, 18 Ves. 355; *Sunderland v. Newton*, 3 Sim. 450), and in a proper case the effect of an order for specific performance will be attained by an injunction against continuing to keep premises out of proper repair. (*Lane v. Newdigate*, 10 Ves. 192; and see *Bidwell v. Holden*, 63 L. T. 104.) Injunction.

Where the instrument contains a proviso for re-entry applicable thereto, a landlord may, after giving the notice required by 44 & 45 Vict. c. 41, s. 14, and the tenant's failure to comply therewith, re-enter for breach of a covenant or agreement to repair. But not for non-repair during a period which the tenant was kept out of possession by the landlord. (*Pellatt v. Boosey*, 31 L. J., C. P. 281.) Re-entry.

Formerly the Court would not relieve against forfeiture for such a breach (*Hill v. Barclay*, 18 Ves. 56; *Nokes v. Gibbon*, 3 Drew. 681) unless the conduct of the landlord had made it inequitable for him to be allowed to enforce

his rights. (*Hughes v. Metropolitan Rail. Co.*, 2 App. Cas. 439; 46 L. J., C. P. 583; *Birmingham & District Land Co. v. London & N. W. Rail. Co.*, 60 L. T. 527.) Now, however, the Court has discretionary power to grant such relief. (44 & 45 Vict. c. 41, s. 14. *Coatsworth v. Johnson*, 55 L. J., Q. B. 220; *Swain v. Ayres*, 36 W. R. 798; 21 Q. B. D. 289.) A landlord is not entitled to judgment for possession unless the premises are out of repair at the date of the writ. (*The Skinners Co. v. Knight*, 63 L. T. 698; [1891] 2 Q. B. 542; *Doe v. Durnford*, 2 Cr. & J. 667; 1 L. J., Ex. 251.)

At what time
action for
damages may
be brought.

A covenant to *put in repair* can only be broken once for all, and damages thereupon having been recovered, no further action can be brought. (*Coward v. Gregory*, L. R., 2 C. P. 153; 36 L. J., C. P. 1.) But if the covenant be to *keep in repair*, the tenant must have the premises in repair at all times during the term (*Luxmore v. Robson*, 1 B. & Ald. 584), the right of action arises as soon as the breach happens, and an action may be maintained either during the term or after; and the recovery of damages in one action upon such a covenant is no bar to a subsequent action for a continuing breach. (*Coward v. Gregory*, L. R., 2 C. P. 153; 36 L. J., C. P. 1.) If the covenant be to *leave in repair* only, no action will lie upon it until the end of the term. (Shep. Touch. 174.) In practice, the covenant used is both to keep and leave in repair.

Measure of
damages—

The measure of damages for non-repair is, properly, the loss which the plaintiff sustains, by reason of the default of the defendant (*Colley v. Streeton*, 2 B. & C. 273, 280; *Davies v. Underwood*, 2 H. & N. 570; 27 L. J., Ex. 113), and will differ as the action is brought during, or after the determination of, the tenancy. (*Henderson v. Thorn*, 37 Sol. J. 457.)

when action
brought
during
tenancy,

When the action is brought during the continuance of the tenancy (*i. e.*, on the covenant to keep in repair), the measure of damages is not the cost necessary to put the premises into repair, but the diminution of the market value of the reversion. (*Doe v. Rowlands*, 9 C. & P. 734; *Smith v. Peat*, 9 Ex. 161; 23 L. J., Ex. 84; *Mills v. East London Union*, L. R., 8 C. P. 79; 42 L. J., C. P. 46.) The damage might be very great if the term had only one year to run, and very little if it had ninety-nine years to run. (*Doe v. Rowlands*, *supra*; *Turner v. Lamb*, 14 M. & W. 412; and see *Joyner v. Weekes*, [1891] 2 Q. B. 35, *per Wright, J.*)

The application of this rule in a case in which the plaintiff is himself a tenant suing his sub-lessee, may sometimes conflict with the rule which entitles the plaintiff to the loss he actually sustains, as in the case of *Williams v. Williams* (L. R., 9 C. P. 659; 43 L. J., C. P. 382), in which A. had leased to B., who sub-leased to C., the latter covenanting to repair generally and to repair after two months' notice; B. having received notice to repair from A., in turn gave notice to C.; but fearing a forfeiture and without waiting for the notice to C. to expire, he went in and did the repairs and sought to recover the amount thereof from C. It was held that he could not recover under the covenant to repair after notice, as the writ was issued before the notice had expired, and that under the general covenant to repair, he could only recover nominal damages, since, having himself done the repairs, it could not be shown that the reversion was depreciated in value. Had the plaintiff awaited the expiration of the notice, then, after a reasonable period, he might have entered and done the repairs, and, so far as such repairs were within the sub-lessee's covenant, recovered the amount expended. (*Colley v. Streeton*, 2 B. & C. 273.)

by tenant
against sub-
lessee ;

But, unless a covenant to repair is supplemented by a covenant to indemnify, a tenant cannot recover from his undertenant the damages and costs of an action brought by the superior landlord in consequence of the undertenant's neglect to repair. (*Penley v. Watts*, 7 M. & W. 601, 609.) A covenant in the underlease in the same terms as in the lease is not a covenant of indemnity. (*Walker v. Hatton*, 10 M. & W. 249; *Logan v. Hall*, 4 C. B. 598; 16 L. J., C. P. 252; *Pontifex v. Foord*, 53 L. J., Q. B. 321, *ante*, p. 185.) But where the underlease was "subject in all respects to the terms of the existing lease, and the covenants and stipulations contained therein," this was held to be an implied contract of indemnity, under which the undertenant was liable for the damages and costs of an action brought in consequence of his failure to repair. (*Hornby v. Cardwell*, 8 Q. B. D. 329; 51 L. J., Q. B. 89.) As to the remedies of a sub-lessor against his tenant on a covenant to indemnify, see "UNDERLEASES," in Chapter X.

When the action is brought after the tenancy is ended, that is, upon the covenant to yield up in repair, the dam-

when action
brought after
tenancy de-
termined,

ages are such a sum as will put the premises into the state of repair in which the tenant was bound to leave them (*Morgan v. Hardy*, 35 W. R. 254; 17 Q. B. D. 770; *Woodhouse v. Walker*, 5 Q. B. D. 408; 49 L. J., Q. B. 612; *Joyner v. Weeks*, [1891] 2 Q. B. 31; 60 L. J., Q. B. 510; 65 L. T. 16); notwithstanding the landlord may immediately proceed to demolish the buildings (*Rawlings v. Morgan*, 18 C. B., N. S. 776; 34 L. J., C. P. 185; *Inderwick v. Leech*, Cab. & E. 412); or notwithstanding, in the case of buildings pulled down, their removal may have improved the premises (*Woolcock v. Deu*, 1 F. & F. 337); or notwithstanding the landlord sustains no actual damage by the breach. (*Joyner v. Weeks*, *supra*.)

The landlord is also entitled to recover the rent which the premises would have produced if let during the reasonable time they are undergoing repair. (*Woods v. Pope*, 6 C. & P. 782; 1 Bing. N. C. 467; *Rust v. Victoria Graving Dock Co.*, 56 L. T. 216; 35 W. R. 672; *Proudfoot v. Hart*, 25 Q. B. D. 42, 47, *per* Cave, J.; *Birch v. Clifford*, 8 Times L. R. 103.)

against a sub-lessee.

A sub-lessor may maintain an action for non-repair, notwithstanding his interest in the premises has been forfeited (*Davies v. Underwood*, 2 H. & N. 570; 27 L. J., Ex. 113), and although he cannot recover as damages the value of the term forfeited by reason of his tenant's non-repair (*Logan v. Hall*, *supra*), he is entitled to recover as in the ordinary case of a tenancy determined, the amount necessary to put the premises into the state in which the undertenant had agreed to leave them, for though he has no reversion to be injured, he may be answerable over to his superior landlord for the amount of these damages. (*Clow v. Brogden*, 2 M. & Gr. 39; *Davies v. Underwood*, *supra*.)

Measure of damages in action against landlord.

If the landlord contract to repair, and the premises become ruinous or out of repair, the tenant may repair or rebuild, as the case may require, if the landlord fail to do so within a reasonable time after request, and recover the cost from the landlord. (*Green v. Eales*, 2 Q. B. 225; 11 L. J., Q. B. 63.) The landlord will not, however, be responsible for expenses incurred by the tenant in entering on and fitting up other premises pending repairs, or for the rent thereof (*ib.*); but in case of unreasonable delay by the landlord in commencing repairs, the tenant will be

entitled to such damages as the delay may have caused. (See *Manchester Bonded Warehouse Co. v. Carr*, 5 C. P. D. 507; 49 L. J., C. P. 809).

SECT. 6.—*Cultivation and Husbandry.*

In the absence of any special agreement as to the mode of cultivation, the mere relation of landlord and tenant raises an implied promise on the part of the tenant of a farm to manage it in a husbandlike manner in accordance with the custom of the country. (*Powley v. Walker*, 5 T. R. 373; *Onslow v. ———*, 16 Ves. 173.)

Implied duty to farm according to the custom of the country.

It was formerly considered that the tenant was bound to consume the hay, straw, and dung upon the premises. (*Brown v. Crump*, 1 Marsh. 567.) But this, in the absence of agreement, must depend upon the custom of the country. (*Onslow v. ———*, *supra*; *Gough v. Howard*, Peake, Add. Ca. 197.)

The obligation to farm in accordance with the custom of the country means that the tenant must conform to the approved usages of husbandry in the district where the land lies, under circumstances of a like nature. (*Legh v. Hewitt*, 4 East, 154.) By "custom" is not meant something satisfying the strict legal meaning of that term, *e.g.*, it need not be immemorial; it is sufficient if it be shown to be the usage of the neighbourhood at the time of the alleged breach (*Dalby v. Hirst*, 1 B. & B. 224); but mere usage on a particular estate, or on the property, however extensive, of a particular individual, will not be sufficient. (*Womersley v. Dally*, 26 L. J., Ex. 219.) And the custom must be proved actually and not inferentially; for it is not enough to show a custom eight miles away, unless it be proved to extend to the place in question. (Co. Litt. 270 b (n. 228).)

Custom of country defined;

Custom of the country as applied to husbandry, does not mean a certain known uniform and precise course of husbandry, but admits of variation within the limits of the prevalent usages of the district. Thus, there is no custom as to the proportion of land to be allowed in tillage at one time, or the amount to be spent in manure to be consumed every year. (*Brown v. Crump*, 1 Marsh. 567.) But it is

not a precise course of husbandry.

contrary to the custom for a tenant to till half his farm in a district where no other farmer tills more than a third, and many till only a fourth. (*Legh v. Hewitt, supra.*)

Must be
certain and
reasonable.

A custom to be supported must be certain and reasonable in itself. The reasonableness of a custom is a matter of law for the court, not one of fact for a jury. (*Tyson v. Smith*, 9 A. & E. 421; *Bradburn v. Foley*, 3 C. P. D. 129; 47 L. J., C. P. 331; *Tucker v. Linger*, 8 App. Ca. 508; 52 L. J., Ch. 941.)

Custom at-
taches unless
excluded by
stipulation.

Where a custom is proved to exist, it is applicable to all tenancies in whatever way created, whether verbal or in writing, unless expressly or impliedly excluded by the written terms themselves. (*Wilkins v. Wood*, 17 L. J., Q. B. 319; *Wigglesworth v. Dallison*, 1 Sm. L. C. 569, 9th ed.) It is, however, excluded by any stipulations in the instrument of demise which are inconsistent with the custom (*Webb v. Plummer*, 2 B. & Ald. 750; *Roberts v. Barker*, 1 Cr. & M. 808; *Clarke v. Roystone*, 13 M. & W. 752), but only so far as those stipulations are inconsistent with it. (*Hutton v. Warren*, 1 M. & W. 466; *Holding v. Pigott*, 7 Bing. 465; *Muncey v. Dennis*, 26 L. J., Ex. 66.) In a district where a custom prevailed for farm tenants to sell for their own benefit flints brought to the surface by ploughing, the custom was held to be not inconsistent with and not excluded by a reservation of "all mines and minerals" in the instrument of tenancy. (*Tucker v. Linger, supra.*) Where by a lease the tenant had the use, for depasturing cows, of certain lands described as "summer leazes," and "after grass," respectively, from 2nd February to 17th November, evidence was held admissible of a custom of the country that the lessor could, notwithstanding such a lease, put cattle of his own on the lands called "summer leazes," up to the 12th May, it being regarded as evidence of the meaning of the term "summer leazes" according to the custom of the country. (*Tudgay v. Sampson*, 30 L. T., N. S. 262.)

Express
stipulations—

Usually a tenant's obligation in respect of cultivation and management of the property is defined by his lease, the terms of which are often in accordance with the custom of the country.

run with the
land.

Covenants as to the cultivation of the property demised run with the land. (*Cockson v. Cock*, Cro. Jac. 125.)

As to tillage.

A covenant to cultivate on the four course system according to the custom of the country, means so far as is uni-

versally obligatory by the custom of the country. (*Newson v. Smythies*, 1 F. & F. 477.) With regard to the four course system, it is not every slight departure from it that would necessarily work a forfeiture. There is considerable difference of opinion as to the four course system, and what constitutes a breach of the four course system, particularly with regard to fallow. (*Rankin v. Lay*, 29 L. J., Ch. 737; 2 De G., F. & J. 65, *per* Lord Campbell.) An agreement to cultivate, manage, and quit agreeably to the manner in which the farm had been sown, managed and quitted by the then previous tenant, was held not to bind the new tenant to the terms of the outgoing tenant's lease, but only to manage and cultivate in the mode in which at the time of entry he found the farm to be managed and cultivated. (*Liebenrood v. Vines*, 1 Mer. 15, 719; and see *Hood v. Kendall*, 17 C. B. 260.) A covenant not to sow with more than two grain crops during four years was held to apply to any four years of the term, however taken, and not to each successive four years from the commencement. (*Fleming v. Snook*, 5 Beav. 250.) A covenant to manure land with two sets of manure within the last six years of the term, the last set to be laid on within three years of the expiration of the term, is satisfied by the tenant laying on both sets within the three last years of the term. (*Pownall v. Moores*, 5 B. & Ald. 416.)

A covenant to leave at the end of the lease the turnip fallows once ploughed, and to sow the breaks that fall to be in grass, with a certain quantity of seed, was held to mean that the land which in the regular course of rotation should be in fallow and seed respectively, should be ploughed and sown. (*Hunter v. Miller*, 9 L. T., N. S. 159 (H. L.)) A covenant to permit the landlord during the last year of the tenancy to enter and sow certain seeds along with the tenant's crops, does not oblige the tenant to give notice of what crops he has sown. (*Hughes v. Richman*, Cowp. 125.)

Leases of agricultural land usually contain a covenant against the alteration of the face of the soil by breaking up pasture or meadow land, frequently with an additional penal rent in case of non-observance. (*Infra*, sect. 17.) Indeed, converting pasture into arable land would be waste, and a covenant to manage pasture in a husbandlike manner is equivalent to a covenant not to convert it into arable. (*Drury v. Molins*, 6 Ves. 328.) Whether using

Against
breaking-up
meadow land.

pasture land as a racecourse and a training ground for horses was a breach of a covenant that the lessee should not plough, convert into tillage or for brick earth, or for any other purpose whatsoever, was held to be a question of fact for a jury. (*Aldridge v. Howard*, 4 M. & Gr. 291.) In an action against the tenant for ploughing up meadow land, the tenant is not estopped by the description in the lease of certain fields as meadows, from proving that they were arable at and before the lease. (*Skipworth v. Green*, 8 Mod. 311; 1 Stra. 610.)

Converting
arable land
into market
garden.

Converting arable land into market garden by covering part of it with glass houses, was held not to be a breach of a covenant to cultivate and manage "according to the best rules of husbandry practised in the neighbourhood," it being shown that many of the neighbouring farms were wholly or partially cultivated in the same way. (*Meux v. Cobley*, [1892] 2 Ch. 253.)

As to con-
sumption of
crops,

Stipulations for the consumption of the crops upon the premises, or the return of an equivalent for those removed, vary extremely. A stipulation that the tenant shall not sell any hay, straw, &c., grown or produced upon the farm, without the licence of the landlord, is broken by a sale of straw after the expiration of the tenancy (*Massey v. Goodall*, 20 L. J., Q. B. 526; 17 Q. B. 310; *St. Germain v. Willan*, 2 B. & C. 216), and a covenant not, during the last year of the term, to sell or remove from the lands demised, any hay, &c. which shall arise and grow thereon, prohibits the lessee from removing any hay, &c. during the last year of the term, at whatever period of the term it may have grown. (*Gale v. Bates*, 33 L. J., Ex. 235; 3 H. & C. 84.) If a tenant covenant to consume the hay on the premises, or for every load of hay removed to bring two loads of manure, the bringing of the manure is not a condition precedent to the carrying off the hay; but after the tenant has quitted possession, the incoming tenant may refuse to allow the hay to be removed until the manure is brought. (*Smith v. Chance*, 2 B. & Ald. 753.) A covenant to consume all the produce on the premises, and in case the tenant removed any, which he was at liberty to do, to bring back within three months one ton of manure for every ton of produce removed, was held to be an alternative covenant, and the landlord could not recover unless he negatived both the consumption and the failure to bring back. (*Richards v. Bluck*, 6 C. B. 437; 18 L. J., C. P.

15.) If the covenant is to pay an additional rent for every ton removed or sold off, the amount must be paid though the hay is unfit for cattle to eat (*Fielden v. Tattersall*, 7 L. T., N. S. 718), and under such a covenant the tenant has the absolute right to remove if he pay the price. (*Leigh v. Lillie*, 30 L. J., Ex. 25; 6 H. & N. 165.)

Where the agreement ran "No hay or straw to be sold off the said land without the consent of the landlord, except the *value* of the hay or straw so sold off be returned in manure," the Court was equally divided, Pollock, C. B., and Parke, B., holding that if the tenant sold straw he was only bound to spend upon the land as much manure as the straw would have produced, and Alderson, B., and Platt, B., that the tenant was bound to return in manure the price or market value of the straw. (*Lowndes v. Fountain*, 11 Ex. 487; 25 L. J., Ex. 49.) Where a tenant was to leave all hay and straw not used as fodder arising from the last year's crop, to be paid for at "a fair valuation," this was held not to mean at a consuming price. (*Cumberland v. Glamis*, 24 L. J., C. P. 46; 15 C. B. 348.)

A stipulation against the removal of manure includes and manure. manure made by agisted cattle, though not fed with the produce of the farm. (*Hindle v. Pollitt*, 6 M. & W. 529.)

The statute 56 Geo. III., c. 50, after reciting that it is expedient the execution of legal process should be so regulated as to be consistent with good husbandry, and the effect and intent of covenants and agreements entered into between owners and occupiers of land let to farm; provides, that, no sheriff shall by virtue of any process carry off, or sell, or dispose of for the purpose of being carried off from any lands let to farm, any straw, threshed or unthreshed, or any straw or crops growing, chaff, colder, turnips, or manure in any case, nor hay, grass or grasses, whether natural or artificial, nor any tares or vetches, roots or vegetables, being produce of such land in any case where, according to any covenant or written agreement entered into and made for the benefit of the landlord, such hay, &c., ought not to be taken off or withholden from such lands, or which by the tenor or effect of such covenants or agreements ought to be used or expended thereon, and of which covenants or agreements such sheriff shall have received a written notice before he shall proceed to sale. (Sect. 1.)

Sheriff not to sell straw, chaff, or turnips in any event, nor any hay or other produce contrary to the covenant.

Assignee or trustee in bankruptcy of tenant not to dispose of crop in any other way than the tenant might.

No assignee [trustee, *Lybbe v. Hart*, 52 L. T. 634; 54 L. J., Ch. 860; 29 Ch. D. 8; *Schofield v. Hincks*, 37 W. R. 157; 58 L. J., Q. B. 147] of any bankrupt, nor any assignee under any bill of sale, nor any purchaser of the goods, chattels, stock, or crop of any person employed in husbandry on any lands let to farm, shall take, use, or dispose of any hay or other produce, or any manure or other dressings intended for such lands and being thereon, in any other manner, and for any other purpose, than such bankrupt or other person so employed in husbandry ought to have taken, used, or disposed of the same. (Sect. 11.) This latter section is not confined to sales under an execution, but applies to an ordinary sale by the tenant himself, and a purchaser from the tenant is bound by the terms of the lease under which the tenant holds. (*Wilmot v. Rose*, 23 L. J., Q. B. 281; 3 E. & B. 563.) But notwithstanding a tenant may, by the terms of his lease, be bound to consume hay, straw, and other crops on the premises, this statute does not entitle the landlord, selling under a distress, to sell crops subject to a condition that they shall be so consumed. (*Hawkins v. Walrond*, 45 L. J., C. P. 772; 1 C. P. D. 280; *Ridgway v. Stafford*, 6 Ex. 404.)

Stipulation as to "team work."

If a tenant of a farm stipulate "to perform each year for the landlord at the rate of one day's team work with two horses and one proper person for every 50% of rent," this means to do such work as may be fit for such a team to do, and not necessarily agricultural labour, but it does not oblige the tenant to find a cart, plough, or other vehicle or machine necessary for the performance of the work. (*Duke of Marlborough v. Osborn*, 33 L. J., Q. B. 148; 5 B. & S. 67.)

Specific performance of farming covenants.

The Court will not direct the specific performance of husbandry covenants in a farming lease (*Rayner v. Stone*, 2 Eden. 128; *Phipps v. Jackson*, 56 L. J., Ch. 550; 35 W. R. 378), nor grant an injunction which would in effect be a direction for the performance of an affirmative farming covenant. Thus an injunction will not be granted to restrain a lessee from permitting the land to remain uncultivated (*Musgrave v. Horner*, 23 W. R. 125; 31 L. T. 632); or to restrain him from permitting his farm to remain without a sufficient stock of cattle (*Phipps v. Jackson*, *supra*), contrary to the stipulations in his lease.

Injunction.

Where there is an express negative covenant in a lease, or where the Court sees that a single act threatened by the

tenant is in direct violation of a covenant which necessarily implies a negative, an injunction will be granted. (*Phipps v. Jackson, supra.*) Thus an injunction will be granted to restrain a tenant from carrying off hay, straw, or other crops or manure contrary to an affirmative covenant to consume such crops or manure upon the premises. (*Geast v. Belfast*, 3 Anst. 749, n.; *Phipps v. Jackson, supra*; *Crosse v. Duckers*, 21 W. R. 287; 1 Seton, 466.) And the Court will also interfere where the demise is silent, but the removal is contrary to custom and the consequent implied obligation of the tenant to cultivate in a husbandlike manner. (*Onslow v. —*, 16 Ves. 173; *Walton v. Johnson*, 15 Sim. 352; and form of order, see 1 Seton, 465.) So the tenant will be restrained from ploughing up pasture (*Drury v. Molins*, 6 Ves. 328; *Grey de Wilton v. Saxon*, 6 Ves. 106) or meadow land (*Pratt v. Brett*, 2 Madd. 62); or sowing the land with pernicious crops. (*Ib.*) And the Court will grant an injunction giving effect to a negative covenant as to the rotation of crops. (*Fleming v. Snook*, 5 Beav. 250.)

Where there is an absolute covenant against a particular act with a reserved payment by way of penalty for breach, the landlord is entitled at his option to an injunction or an action for the penalty. (*City of London v. Pugh*, 4 Bro. P. C. 395; *Webb v. Clarke*, 1 Fonblanque Eq. 154; and see cases collected, *French v. Macale*, 2 Dr. & W. 269; 4 Ir. Eq. R. 577; *Coles v. Sims*, 5 De G. M. & G. 1; *National Provincial Bank of England v. Marshall*, 40 Ch. D. 112; *Hanbury v. Cundy*, 58 L. T. 155.) Therefore, where a lessee of lands covenanted not to burn any part of the demised premises "under a penalty of 10*l.* per acre for the lands so burned, to be recovered as additional rent," it was held that he was not entitled to burn the land upon payment of the specified sum as liquidated damages, and an injunction was granted. (*French v. Macale, supra.*)

Injunction notwithstanding penalty reserved;

If the Court arrives at the conclusion that the covenant is not absolute but alternative, and amounts to a stipulation for liberty to do a certain act on payment of a certain sum, the injunction will be refused. (*Woodward v. Gyles*, 2 Vern. 119; *Rolfe v. Peterson*, 2 Bro. P. C. 436; *Peachy v. Somerset*, 2 Wh. & T. L. C. 1126.)

not granted if damages liquidated.

The measure of damages for breach of a farming covenant would appear to be the injury sustained to the

Damages.

reversion by the default, unless a liquidated sum is fixed by the lease.

Remedies for
breach of,
under 46 & 47
Vict. c. 61.

The statute 46 & 47 Vict. c. 61, ss. 6, 7, entitles the landlord, when claims are made by the tenant for compensation under that Act, to obtain, by counterclaim, compensation for any breach of covenant or other agreement committed within four years before the determination of the tenancy. (See *post*, Chap. IX., Sect. 4.)

SECT. 7.—*Boundaries and Fences.*

Tenant's duty
to preserve
boundaries.

A tenant impliedly contracts, among other obligations, to preserve the ancient boundaries of the land demised to him; and not by the removal of walls, fences, or the like, to confuse the landlord's property with his own. (*Att.-Gen. v. Fullerton*, 2 Ves. & B. 263; *Att.-Gen. v. Stephens*, 6 De G. M. & G. 111; *Brown v. Wales*, L. R., 15 Eq. 142; 42 L. J., Ch. 45.)

If the tenant fail to keep the boundaries distinct, the landlord may bring an action to ascertain the boundaries, even during the continuance of the demise. (*Spike v. Harding*, 7 Ch. D. 871; 47 L. J., Ch. 323.) The Court will either grant a commission (*Att.-Gen. v. Fullerton*, *supra*; 2 Set. 1031), or by consent direct a reference to chambers to ascertain the boundaries. (*Spike v. Harding*, *supra*.) If the boundaries cannot be distinguished, the tenant will be compelled to substitute land of equal value. (*Aston v. Lord Exeter*, 6 Ves. 293; *Att.-Gen. v. Stephens*, 6 De G. M. & G. 134; and see *Searle v. Cooke*, 62 L. T. 211; 43 Ch. D. 519.) This relief is given not only against the party guilty of the neglect, but also against all who claim under him, either as volunteers or purchasers with notice; but it must be shown that the tenant is in possession of the specific land originally demised. (*Att.-Gen. v. Stephens*, *supra*.)

Encroach-
ments.

Out of this liability of the tenant to preserve his landlord's boundaries intact, and the consequent presumption against him that if he extends the boundaries of his holding, it is intended for the aggrandisement of the estate of which he is tenant, grew the rule that all encroachments made by the tenant during his tenancy, whether upon land belong-

ing to the landlord or to a stranger, are presumed to be made for the landlord's benefit, unless the contrary appear. (*Whitmore v. Humphries*, L. R., 7 C. P. 1; 41 L. J., C. P. 43; *Att.-Gen. v. Tomline*, 5 Ch. D. 750; 46 L. J., Ch. 654; *Earl of Lisburne v. Davies*, L. R., 1 C. P. 259; 35 L. J., C. P. 193; *Andrews v. Hailes*, 2 E. & B. 349; 22 L. J., Q. B. 409; *Doe v. Tidbury*, 23 L. J., C. P. 57; 14 C. B. 304; *Bryan v. Winwood*, 1 Taunt. 208.)

But this presumption, which is one of fact and not of law (*Andrews v. Hailes*, *supra*), may be rebutted by showing (1) that the tenant took possession contrary to the wishes of the landlord (*Doe v. Massey*, 17 Q. B. 373; 20 L. J., Q. B. 434); or (2) that the encroachment is not held with the demised premises as one occupation. (*Andrews v. Hailes*, *supra*, *per* Coleridge, J.)

The fact whether or not the landlord assented to the encroachment or was ignorant of it, has no bearing upon the matter. (*Whitmore v. Humphries*, *supra*.) And the presumption in favour of the landlord's title is not rebutted by the fact that the encroachment lies on the opposite side of the highway (*Andrews v. Hailes*, *supra*), or is separated from the holding by a brook or small river, fordable by cattle in dry weather. (*Earl of Lisburne v. Davies*, L. R., 1 C. P. 259.) Neither is the presumption rebutted by the tenant executing a conveyance of the encroachments not delivered or followed by possession. (*Doe d. Lloyd v. Jones*, 15 M. & W. 580.) And even if the tenant conveyed, the landlord would not be prejudiced unless he knew of the conveyance. (*Kingsmill v. Millard*, 11 Ex. 313.)

We have previously noticed (*ante*, p. 87) that a tenant cannot during the tenancy acquire by prescription an easement for his other property over the demised lands (*Outram v. Maude*, 17 Ch. D. 391; 50 L. J., Ch. 783; *Chamber Colliery Co. v. Hopwood*, 55 L. J., Ch. 859; 55 L. T. 449); nor in respect of the demised premises acquire an easement, except as to light, over another close belonging to the same landlord. (*Gayford v. Moffatt*, L. R., 4 Ch. 133.)

Under the obligation to farm in a husbandlike manner is included the duty of maintaining the fences of the property demised. (*Cheetham v. Hampson*, 4 T. R. 318; *Whitfield v. Weedon*, 2 Chitt. 685.) For this purpose the tenant is entitled to reasonable estovers (Co. Litt. 41 b), and may cut timber to keep the walls, pales, fences, hedges,

To maintain fences.

Remedies for infringement of rights as to demised trees.

of dotards or dead timber, and of trees which are not timber, to the tenant. (*Herlakenden's case*, 4 Co. Rep. 62.)

If the landlord fells timber not excepted from the demise, the tenant will be entitled to damages adequate to the loss of his particular interest and for the trespass. (2 Wms. Saund. 322 b.) If the tenant fells or injures such timber, he will be liable to an action for waste. If a stranger cuts them down, both landlord and tenant may have an action against him to recover their respective losses. (Co. Litt. 57 a; *Bedingfield v. Onslow*, 3 Lev. 209.)

Covenants as to trees.

Where woods and trees are included in a demise, a covenant by the tenant to leave them in the same plight as he finds them is broken by his cutting them down, but not by their being blown down by the wind, or otherwise destroyed by the act of God. (1 Shep. Touch. 173.) A covenant to yield up the trees in an orchard, "reasonable use and wear only excepted," is not broken by cutting down trees decayed and past bearing in a crowded part of the orchard, and planting an equal number in a less crowded part (*Doe v. Crouch*, 2 Camp. 449); but a covenant not to remove, grub up, or destroy trees, is broken by removing trees from one part of the premises to another, or by taking away trees (not being dead), though the tenant plant a greater number than he remove. (*Doe v. Bird*, 6 C. & P. 195.)

A lease of land and quarries with an exception of the trees, contained a covenant not to commit waste by cutting the trees, and inasmuch as the cutting of some wood was necessary in order to work the quarry, and as waste cannot be committed of a thing excepted, it was held to mean that the tenant was not to cut down the trees to such an extent that if they had not been excepted, the cutting would have amounted to waste. (*Doe v. Price*, 19 L. J., C. P. 121; 8 C. B. 894.)

Rights in respect of excepted trees.

Where the lessor reserves the trees, this includes the boughs and fruit (1 Shep. Touch. 100), and the tenant has no interest in the trees whatever (2 Wms. Saund. 322 b), except, possibly, the right to timber which was decayed at the date of the lease. (*Channon v. Patch*, 5 B. & C. 897.) Such an exception makes it trespass, not waste, in the tenant to fell or lop the trees. (*Goodright v. Vivian*, 8 East, 190.) It gives the lessor the right at all times to enter upon the land to show, sell, cut, and carry away the

trees (1 Shep. Touch. 100; *Hewitt v. Isham*, 21 L. J., Ex. 35; 7 Ex. 77), but not to saw them or leave them an unreasonable time. (*Ib.*) Moreover, an injunction will be granted restraining the landlord from cutting excepted trees where the tenant, with the consent of the landlord, has expended money upon the faith of the trees not being cut down. (*Jackson v. Cator*, 5 Ves. 688.)

The tenant is not bound to protect the excepted trees or their young shoots, nor is he liable to an action if his cattle injure them. (*Clitheroe v. Higgs*, Sir W. Jones, 388; *Glenham v. Hanby*, 1 Ld. Raym. 739.)

Underwood is in the nature of a crop. It may be cut by the tenant at the periodical times which usage or the custom of the country has established, but not before or after those times. (*Humphreys v. Harrison*, 1 J. & W. 581; *Brydges v. Stephens*, 6 Mad. 279.) Underwood.

When not excepted from the demise (see *Jenney v. Brook*, 13 L. J., Q. B. 376; 6 Q. B. 323), all hedges, bushes, and trees not timber belong to the tenant. (*Berriman v. Peacock*, 9 Bing. 384.) If the tenant exceed his right by grubbing up or destroying fences he may be liable for waste. (*Ib.*; Co. Litt. 53 a.) Hedges, bushes, &c.

If a tree grows near the confines of two adjoining properties so that its roots extend into the soil of each, it belongs to the proprietor of the land in which it was first planted, and if that cannot be ascertained the property is determined by acts of ownership. (*Holder v. Coates*, M. & M. 112.) In *Waterman v. Soper* (1 Ld. Raym. 737), it was held that the proprietors would be tenants in common of the tree. Trees rooted in two properties.

If the boughs of the trees on one man's land grow over the land of another, the latter may cut them off, but he cannot cut them off before they grow over, to prevent them so growing. (*Norris v. Baker*, 1 Rolle Rep. 394; *Earl of Lonsdale v. Nelson*, 2 B. & C. 311.) So trees which grow over a highway may be lopped by any one sufficiently to avoid inconvenience to passers. (As to the difference between lopping and topping, see *Unwin v. Hanson*, [1891] 2 Q. B. 115.) Care must be taken not to cut off more than actually overhangs, or the person cutting may render himself liable in damages. (*Pickering v. Rudd*, 1 Stark. 56.) The same rules apply to the roots of trees. Overhanging boughs.

SECT. 9.—*Game and Sporting.*

Sporting
belongs to
tenant, unless
reserved.

Reservation
of.

Beasts and birds of game, being wild animals, are not, strictly speaking, the subject of property. The right of sporting, that is, the right to go upon the land to take and kill game, is part of the dominion over the land, and in England passes by a demise to the tenant unless expressly reserved. (*Copland v. Maxwell*, L. R., 2 Sc. & D. 103.)

When reserved or separately granted, it is a licence of a profit *à prendre* (*Ewart v. Graham*, 7 H. L. 344; 29 L. J., Ex. 88), and entitles the grantee to sport by himself or his servants. (*Wickham v. Hawker*, 7 M. & W. 78, 79.)

A general power to lease lands does not authorize the lessor to grant a lease of part of the lands with the right of sporting over the rest. (*Dayrell v. Hoare*, 12 A. & E. 356.)

In practice, the right of sporting is usually reserved to the landlord in agricultural leases. It is also frequently let separately to third persons. In a sporting lease the usual covenant to keep up the stock of game runs with the land. (*Hooper v. Clark*, L. R., 2 Q. B. 200; 36 L. J., Q. B. 79.) Where a mansion and land were demised with the sole licence of shooting over adjoining lands of the lessor subject to the liberty for each tenant on his farm to kill rabbits with ferrets, it was held that the exception extended not only to farms existing at the time of the demise, but also to those subsequently created. (*Newton v. Wilmot*, 8 M. & W. 711.)

A reservation is not created by a mere agreement by the tenant not to destroy but to preserve the game; in such a case, during the tenancy neither landlord nor tenant can sport. (*Coleman v. Bathurst*, L. R., 6 Q. B. 366; 40 L. J., M. C. 131.) A grant to a lessee of a right of sporting over land in common with the lessor and any friend of his, was held to reserve to the lessor the right of taking any number and not merely a single friend. (*Gardiner v. Colyer*, 12 W. R. 979.) "Game" is an indefinite word in a contract; but in a reservation of the exclusive right of sporting, all things generally sported after are included. (*Jeffryes v. Evans*, 34 L. J., C. P. 261.)

Sporting
rights to be
exercised in
a reasonable
manner;

Under a demise or reservation of the exclusive right of sporting over land, the person exercising the right must not trample crops at an unusual or unreasonable time (*Hilton v. Green*, 2 F. & F. 821), nor turn on game bred

elsewhere to the injury of the crops (*Birkbeck v. Paget*, 31 Beav. 403), nor overstock his land with game bred elsewhere to the injury of his neighbours. (*Farrer v. Nelson*, 15 Q. B. D. 258; 54 L. J., Q. B. 385.)

Where a lease was granted of sporting rights over lands let to another person, and contained a covenant by the lessee to keep down the rabbits so that no appreciable damage should be done to the crops, it was held, in an action by the landlord for breach of this covenant, that as he had suffered no damage himself, and was under no liability to compensate the tenant of the lands for damage, he was only entitled to nominal damages, though he might have obtained an injunction. (*West v. Houghton*, 4 C. P. D. 197; 27 W. R. 678.)

The grant or reservation of the right of sporting does not hinder the holder of the land from destroying furze and underwood, so long as he acts in reasonable use of the land and does not resort to expedients for driving the game away. (*Jeffryes v. Eans*, 34 L. J., C. P. 261; 19 C. B., N. S. 246.) He is entitled to cut down trees in the proper course of management, even though prejudicial to the shooting (*Gearns v. Baker*, L. R., 10 Ch. 355; 44 L. J., Ch. 334), and to offer the property for sale in lots as building premises with notice of the sporting rights. (*Pattison v. Gilford*, L. R., 18 Eq. 259; 43 L. J. Ch. 524.)

and are
subject to
reasonable
use of land.

As no one is entitled to enter the lands of another without his leave and against his will, a person who is hunting with fox-hounds for the purpose of sport cannot justify a trespass on the ground that he is in fresh pursuit of a fox. (*Paul v. Summerhayes*, 4 Q. B. D. 9; 48 L. J., M. C. 33.) Where the lease contains a reservation to the landlord of the right of hunting, he and others by his authority may enter.

Fox-hunting.

The statute 1 & 2 Will. 4, c. 32, which consolidated the previous statutes as to game, enacted that nothing in that Act contained should authorize any person holding any land to kill or take, or permit others to kill or take, the game upon such land where by any lease, or written, or parol demise, or contract, a right of entry upon such land for the purpose of killing or taking the game, has been, or hereafter shall be reserved, or retained by, or given to any lessor, landlord, or other person whatsoever (sect. 8). The reservation may be in a letting not under seal (*ante*, p. 90).

Provisions of
1 & 2 Will. 4,
c. 32.

Where the landlord has reserved the right to kill the game, he may authorize others to sport (sect. 11), and if the tenant either kill or take game himself, or give permission to any other person to do so, he subjects himself to a penalty not exceeding 2*l.* for the sporting, and 1*l.* per head for the game killed (sect. 12).

The Ground
Game Act,
1880.

Right to kill
ground game
inseparable
from occu-
pation.

The damage to tenants caused by hares and rabbits has been specially provided for by the Ground Game Act, 1880 (43 & 44 Vict. c. 47). It defines "ground game" to mean hares and rabbits (sect. 8), and by section 1, enacts that "every occupier of land shall have, as incident to and inseparable from his occupation of the land, the right to kill and take ground game thereon, concurrently with any other person who may be entitled to kill and take ground game on the same land: provided that the right conferred on the occupier by this section shall be subject to the following limitations:—

(1.) The occupier shall kill and take ground game only by himself, or by persons duly authorized by him in writing:

- (a) The occupier himself and one other person authorized in writing by such occupier shall be the only persons entitled under this Act to kill ground game with fire-arms;
- (b) No person shall be authorized by the occupier to kill or take ground game, except members of his household resident on the land in his occupation, persons in his ordinary service on such land, and any one other person *bonâ fide* employed by him for reward in the taking and destruction of ground game;
- (c) Every person so authorized by the occupier, on demand by any person having a concurrent right to take and kill the ground game on the land, or any person authorized by him in writing to make such demand, shall produce to the person so demanding the document by which he is authorized, and in default he shall not be deemed to be an authorized person.

(2.) A person shall not be deemed to be an occupier of land for the purposes of this Act by reason of his having a right of common over such lands; or by reason of an occupation for the purpose of grazing or pasturage of sheep, cattle, or horses, for not more than nine months.

(3.) In the case of moorlands, and uninclosed lands (not being arable lands), the occupier and the persons authorized by him shall exercise the rights conferred by this section only from the eleventh day of December in one year until the thirty-first day of March in the next year, both inclusive; but this provision shall not apply to detached portions of moorlands or uninclosed lands adjoining arable lands, where such detached portions of moorlands or uninclosed lands are less than twenty-five acres in extent.

Sect. 2 enacts that where the occupier of land is entitled otherwise than in pursuance of this Act to kill and take ground game thereon, if he shall give to any other person a title to kill and take such ground game, he shall nevertheless retain and have, as incident to and inseparable from such occupation, the same right to kill and take ground game as is declared by section one of this Act. Save as aforesaid, but subject as in section six hereafter mentioned, the occupier may exercise any other or more extensive right which he may possess in respect of ground game or other game, in the same manner and to the same extent as if this Act had not passed.

Sect. 3 enacts that "every agreement, condition, or arrangement which purports to divest or alienate the right of the occupier as declared, given, and reserved to him by this Act, or which gives to such occupier any advantage in consideration of his forbearing to exercise such right, or imposes upon him any disadvantage in consequence of his exercising such right, shall be void." This section is not retrospective. (*Allhusen v. Brooking*, 26 Ch. D. 559; 53 L. J., Ch. 520.) By sect. 5, "where at the date of the passing of this Act" (7th September, 1880), "the right to kill and take ground game on any land is vested (equitably or legally, *Allhusen v. Brooking*, *supra*), by lease, contract of tenancy, or other contract *bonâ fide* made for valuable consideration, in some person other than the occupier, the occupier shall not be entitled until the determination of that contract to kill and take ground game on such land.

Any attempt to divest the right void.

"For the purposes of this Act, a tenancy from year to year, or a tenancy at will, shall be deemed to determine at the time when such tenancy would by law become determinable if notice or warning to determine the same were given at the date of the passing of this Act.

"Nothing in this Act shall affect any special right of killing or taking ground game to which any person other

than the landlord, lessor, or occupier may have become entitled before the passing of this Act, by virtue of any franchise, charter, or Act of Parliament."

SECT. 10.—*Working Mines and Quarries.*

Tenant's
right to open
mines.

In a lease of an unopened mine or quarry an express power should be given to work and win the minerals. A lease of land, without any mention of mines, entitles the tenant to work mines open at the time of the lease, but not to open new ones. (Co. Litt. 54 b; *Saunders' Case*, 5 Co. Rep. 12; *Clegg v. Rowland*, L. R., 2 Eq. 160; 35 L. J. 396.)

And, if there be open mines, a lease of the land "and the mines therein" will only extend to the open mines. (Co. Litt. 54 b; *Astry v. Ballard*, 2 Mod. 193.) But, if there be no open mine, then under a lease of the land together with all mines therein, the lessee may dig for mines and enjoy the benefit thereof. (Co. Litt. 54 b.)

A lease of two seams of coal and all other the seams of coal under the D. estate, was held to authorize the opening of all the unworked seams (*Spencer v. Scurr*, 31 L. J., Ch. 808), and when a mine or quarry is once open, sinking a new pit on the same vein or breaking ground in a new place on the same rock is not necessarily opening a new mine or quarry. (*Elias v. Snowdon Slate Quarries Co.*, 4 App. Ca. 454; 48 L. J., Ch. 811.) It is doubtful, however, whether the tenant can work a new mine through or by means of an old shaft. (*Ferrand v. Wilson*, 15 L. J., Ch. 41.)

Mines and quarries are upon the same footing. (*Elias v. Snowdon Slate Quarries Co.*, *supra*.)

Tenant's
obligation to
work mines.

There is no implied promise on the part of a lessee of mines to work them. Whenever it is intended to make the working compulsory proper stipulations must be inserted in the lease, and the liability of the lessee will depend entirely upon the special terms of the lease. (*Wheatley v. Westminster Brymbo Coal Co.*, L. R., 9 Eq. 538, 554; *Abinger v. Ashton*, L. R., 17 Eq. 370; *James v. Cochrane*, 7 Ex. 170; *Lewis v. Fothergill*, L. R., 5 Ch. 103.)

In a lease of unopened mines it is usual to bind the lessee to make due search for the minerals, and it is a question of fact for a jury whether he has done so. (*Hanson v. Boothman*, 13 East, 22.) To search for.

A covenant "to win" any particular ore is satisfied when the ore is put in a state in which continuous working can go forward in the ordinary way. (*Lewis v. Fothergill*, L. R., 5 Ch. 106 n., 111; *Rokeby v. Elliot*, 9 Ch. D. 685; 13 *ibid.* 277; 47 L. J., Ch. 764; 49 *ibid.* 163.) To win.

The covenant to work is one which varies in terms according to the locality and the nature of the ore. To work.

Where a tenant agreed to work a coal mine so long as it was fairly workable, and there were coals in the mine, but of such a description that it would not pay to work them, it was held that the tenant was not bound to work the mine. (*Jones v. Shears*, 7 C. & P. 346.) In *Griffiths v. Rigby* (1 H. & N. 237), however, Pollock, C. B., expressed an opinion that profit was not the test of whether coal could be fairly wrought, and that fairly wrought meant that which could be fairly and properly gotten according to mining usage without extraordinary difficulty or expense. This view was disapproved in a later case. (*Cartwright v. Forman*, 7 B. & S. 243.) As long as fairly workable.

The Courts do not readily construe covenants to work as obliging the lessee to work at a loss (*Abinger v. Ashton*, L. R., 17 Eq. 358; 22 W. R. 582); and a covenant by a lessee of a brickfield to "get the demised clay to the fullest practicable extent consistent with the means of sale of bricks and tiles to be made therefrom," was held not to bind the lessee to go on working at a loss, he having paid the dead rent. (*Newton v. Nock*, 43 L. T. 197). But an absolute covenant to supply a given quantity of coals to the lessor must be complied with as long as they can be got, although the cost of getting them is more than they are worth. (*Cartwright v. Forman*, 7 B. & S. 243.) Working at a loss.

A mining lease usually contains a covenant to work in "a proper and workmanlike manner," and in dealing with any particular mode of working, the evidence of experts is admissible to show whether it was proper in the particular case. (*Lewis v. Fothergill*, L. R., 5 Ch. 103.) On the one hand, it is not necessarily the best mode of working in the interest of the lessor, and on the other, it does not allow the lessee to get out of the earth as much mineral as he can, regardless of ordinary and workmanlike proceedings. (*Ib.*) "Proper and workmanlike manner."

If there is no provision in the lease for sinking a pit, working by instroke may be a proper and workmanlike manner. (*Ib.*; *Jegon v. Vivian*, L. R., 6 Ch. 742; 40 L. J., Ch. 389.) But a covenant to work properly does not imply a covenant to work continuously. (*Jegon v. Vivian*, *supra*.)

Where the subject of demise was not the mines, but only such as had been or should be discovered or opened, and the tenant covenanted to work the mines in a proper and workmanlike manner, it was held that, as the mines were at the time of the lease unopened, the tenant was not liable for not working them. (*Quarrington v. Arthur*, 10 M. & W. 335.) But where lessees covenanted to sink a shaft, and to work the mine to a certain depth in a proper and workmanlike manner, and did nothing because no reasonable application of skill and labour would enable them to work the mine, the covenant was held to be broken. (*Jervis v. Tomkinson*, 1 H. & N. 195; 26 L. J., Ex. 41.)

Working in
the best mode.

A covenant to work in "the best and most effectual manner, to the best advantage and according to the usual practice of carrying on collieries with effect," is satisfied by adopting the usual practice, whether the best possible mode or not. (*Abinger v. Ashton*, L. R., 17 Eq. 358.) A covenant to work "efficiently and regularly, according to the best and most approved mode," was held to be satisfied by working by instroke, though sinking pits was the "best and most approved mode" of working, the Court considering that the lease did not contemplate the sinking of pits. (*Wheatley v. Westminster Brymbo Coal Co.*, L. R., 9 Eq. 538; 39 L. J., Ch. 175.)

When cove-
nant to work
satisfied by
payment of
dead rent.

Frequently the object of the covenant to work is to secure the payment of a minimum rent, and where that is the case, the lessee has the alternative of working so as to produce the minimum rent or of paying it without working, but he must pay the minimum rent in any event, and notwithstanding the ore may be exhausted. (*Bute v. Thompson*, 13 M. & W. 487; *Jervis v. Tomkinson*, 1 H. & N. 195; 26 L. J., Ex. 41.)

Not if cove-
nant to work
continuously.

But a covenant to work continuously is not satisfied by the payment of the dead rent. In *Wheatley v. Westminster Brymbo Coal Co.* (L. R., 9 Eq. 539; 39 L. J., Ch. 175), Malins, V.-C., expressed an opinion that it is. This evidently was not the view of Lord Hatherley, since he

speaks of an express covenant as one of the "several well-known and approved methods of securing continuous working where it is intended." (*Jegon v. Virian*, 40 L. J., Ch. 389; L. R., 6 Ch. 742.) And the opinion of Malins, V.-C., was dissented from by Jessel, M. R., in a case in which a lease of property contained a covenant to work the property for china clay "in the most proper and effective way, and with a reasonable number of men kept employed on the works at all reasonable and usual working times, and so that the china clay and china stone to be then found may be raised, worked, and made merchantable as speedily as possible," and which (notwithstanding the dead rent was paid) was held to be broken when the lessees for several months ceased to "raise" the china clay, employing all their men in washing and preparing it. (*Kinsman v. Jackson*, 42 L. T. 80, 558.)

If a covenant to work is not intended to serve the purpose of fixing a dead rent, but simply to denote the manner in which the property is to be used, the liability to perform the covenant attaches only so long as the thing demised exists. Therefore, where a lease reserved a royalty but no minimum rent, and contained a covenant by the lessee to dig not less than 1,000 nor more than 2,000 tons of clay in each year, it was held that the covenant was only applicable so long as there was clay upon the land, and that the lessee was not liable to pay the royalty on the 1,000 tons when the clay was not to be found. (*Clifford v. Watts*, L. R., 5 C. P. 577; 40 L. J., C. P. 36.)

When covenant to work co-existent with subject of demise.

The Court will not grant specific performance of a covenant to work a mine or quarry. (*Wheatley v. Westminster Brymbo Coal Co.*, L. R., 9 Eq. 538; *Booth v. Pollard*, 4 Y. & C. Ex. 61; *Pollard v. Clayton*, 1 K. & J. 462.)

Specific performance.

Nor will specific performance in the shape of an injunction be granted to restrain the working of a mine, except there is a clear breach of a covenant negative in form or substance (*ante*, p. 179; *Abinger v. Ashton*, 17 Eq. 370; 22 W. R. 582; *Newton v. Nock*, 43 L. T. 197); or the act complained of is likely to produce irremediable injury. (*Anon.*, Amb. 209; *Lewis v. Fothergill*, L. R., 5 Ch. 103, 110.)

Injunction.

For breach of covenants to work mines the landlord is usually left to his remedy in damages. The measure of damages would seem to be the same as in the case of a covenant to build. (*Ante*, p. 179.)

Measure of damages.

SECT. 11.—*Waste*.

Waste
defined.

Waste is defined as a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the injury of him that hath the remainder or reversion in fee simple or fee tail. (2 Bl. Com. 281.)

Two kinds of
waste.

It can only be committed of the thing demised, and, therefore, cutting trees excepted from the demise is not waste (*Goodright v. Vivian*, 8 East, 190), but it is trespass.

Waste is either voluntary or permissive. Voluntary waste consists of the tenant doing something which he ought not to do; permissive waste consists of his omitting to do something which he ought to do.

No remedy
for waste at
common law;

At common law there was a right of action for waste against a person whose estate was created by the act of the law, such as a tenant by the curtesy or in dower, but none against a person whose estate was created by demise or contract, such as a tenant for life or for years. (*Woodhouse v. Walker*, 5 Q. B. D. 404; 49 L. J., Q. B. 609; 2 Co. Inst. 300.)

only by
statute.

To remedy this, the Statute of Marlbridge (52 Hen. 3, c. 23), s. 2, enacted that "fermors during their term shall not make waste sale nor exile of house, woods, or men, nor of anything belonging to the tenements that they have to ferm without special licence had by writing of covenant making mention that they may do it, which if they do and thereof be convict, they shall yield full damage and shall be punished by amercement grievously." The Statute of Gloucester (6 Edw. 1, c. 5), gave as a more stringent remedy a writ of waste "against him that holdeth by law of England or otherwise, for term of life or term of years," under which the tenant attainted of waste was liable to forfeiture of the thing wasted and treble damages. The writ of waste was gradually replaced by an action on the case founded on the Statute of Westminster 2nd (13 Edw. 1, c. 22), and ultimately, the action with its relief by forfeiture and treble damages was abolished by 3 & 4 Will. 4, c. 27, s. 36. But the rights and liabilities of the parties remained as before, the remedy only being changed (*Woodhouse v. Walker*, *supra*), and the damages recoverable being those actually sustained.

What tenants
liable under
the statutes.

The term "fermors" comprehends all who hold by lease for life or lives or for years, by deed or without deed. (2 Co. Inst. 145.) A tenant from year to year or for half a

year is also within the statutes as a tenant having a term of years. (2 Co. Inst. 302; Co. Litt. 54 b.) A tenant at will is not within the statutes, but if he commit voluntary waste he determines his tenancy and becomes liable as a trespasser. (Co. Litt. 57 a; see *Burchell v. Hornsby*, 1 Camp. 360; *Panton v. Isham*, 3 Lev. 359.)

The terms of the Statute of Marlbridge are "make waste" (*firmarii non faciant vastum*), and there is a strange conflict of authority as to whether the statute makes a tenant liable for permissive as well as for voluntary waste. Coke (2 Inst. 145) was of opinion that it does. This view is supported by *Yellowly v. Goucer* (11 Ex. 274; 24 L. J., Ex. 289); *Davies v. Davies* (38 Ch. D. 499; 57 L. J., Ch. 1093; and see 10 Mod. 282); *Harnett v. Maitland* (16 M. & W. 257). On the other hand there are equally decided opinions that a tenant is not liable for permissive waste. (*Gibson v. Wells*, 1 B. & P., N. R. 291; *Herne v. Bembow*, 4 Taunt. 764; *Re Cartwright, Avis v. Newman*, 41 Ch. D. 532; 37 W. R. 613; 60 L. T. 891.) A third class of cases treats the matter as doubtful. (*Powys v. Blagrove*, 4 De G., M. & G. 448; *Barnes v. Dowling*, 44 L. T. 809; *Woodhouse v. Walker*, 5 Q. B. D. 404; 49 L. J., Q. B. 609.) To hold a tenant from year to year liable for permissive waste would be somewhat in conflict with the decisions upon his limited liability to repair. (*Torriano v. Young*, 6 C. & P. 8; *ante*, p. 180.) A lessee liable for waste is liable by whomsoever it is done, for he had the power to withstand it. (*Greene v. Cole*, 2 Wms. Saund. 259 b (n.).)

Whether
"make
waste" in-
cludes per-
missive waste.

Any lasting damage to the freehold or inheritance, or anything which alters the nature of the property, so as to render the evidence of ownership more difficult, or destroys or weakens the proof of identity, or increases the burden upon the property, is in strictness voluntary waste. (See judgment in *Phillipps v. Smith*, 14 M. & W. 589; *Smyth v. Carter*, 18 Beav. 78.) Therefore, if a lessee pulls down a house demised to him, or removes any part thereof, as the windows, doors, wainscot, or other fixtures, which, though affixed by himself, are not at law removable, or if he unroof buildings, or alter one kind of building into another, as a corn mill into a fulling mill, or a hall into a stable, or throw two rooms into one, or pull down a building and rebuild it on a greater or less scale than before, even though of greater value (*Cole v. Green*, 1 Lev. 309),

Voluntary
waste,

in respect of
buildings;

or build a new house where none was before (but see *Jones v. Chappell*, L. R., 20 Eq. 539; 44 L. J., Ch. 658), or, having built it, suffers it to decay, in each of these cases he is guilty of waste. (2 Roll. Abr. 815; Co. Litt. 53 a; 2 Bl. Com. 282.) It has been held that the erection of new buildings is not waste, if the terms of the lease show that such erection was contemplated, as where there is a covenant to keep all future buildings in a state of repair. (*Jones v. Chappell*, L. R., 20 Eq. 539; 44 L. J., Ch. 658.)

The destruction of, or damage to, the demised premises, is not waste if caused by using the property in a reasonable and proper manner having regard to the purposes for which it was let. (*Saner v. Bilton*, 7 Ch. D. 815; 47 L. J., Ch. 267; *Manchester Bonded Warehouse Co. v. Carr*, 5 C. P. D. 507; 49 L. J., C. P. 809.)

of land ;

It is waste to sow land with any pernicious crop. (*Pratt v. Brett*, 2 Madd. 62.) So to dig and carry away the soil (*Whitham v. Kershaw*, 16 Q. B. D. 613; 54 L. T. 124), to dig clay, to open mines, gravel pits, or the like, or to essentially change the face of the soil, or the nature of its products, as by converting arable land into pasture, or pasture to arable, turning gardens into tillages, sowing grain in hop gardens, or the like. (Com. Dig. "Waste," (D 4); *Simmons v. Norton*, 7 Bing. 648.) But if pasture be converted into tillage for the improvement of the soil, it is not waste; nor is it if the lands have been sometimes pasture and sometimes tillage. (2 Roll. Abr. 815.) Nor is it waste to dig trenches for drawing off water (*Moyle v. Moyle*, Owen, 67), or to dig in mines or pits or work in quarries already opened (*Elias v. Snowdon Slate Quarries Co.*, 4 App. Ca. 454; 48 L. J., Ch. 811), unless old and abandoned, or abandoned for the benefit of the estate (*Bagot v. Bagot*, 32 Beav. 509; 33 L. J., Ch. 116), nor to open new mines where mines are expressly named in the demise. But if there be a lease of land and mines, and there be a mine open and another not open, the lessee cannot work or open the unopened mine. (*Clegg v. Rowland*, ante, p. 218.) A tenant may dig for gravel or clay for the reparation of the house. (Co. Litt. 53 b.)

of trees ;

It is waste in a tenant to cut down timber trees, or such as by custom are accounted timber trees (Co. Litt. 53 a), or to lop them so as to cause them to decay, or after cutting underwood to suffer the young germins to decay, or to cut trees growing for the shelter of the house (*Dunn v. Bryan*,

Ir. Rep., 7 Eq. 143; 21 W. R. Dig. 119), or to remove or injure a quickset fence. But it is not waste to cut trees which are not timber either by the general law or by custom, and if timber trees are dead they may be cut down, and so may the underwood. Moreover, a tenant (unless restrained by covenants or exceptions, which is usual) may cut down timber for necessary botes, as house-bote, hedge-bote, &c. (2 Bl. Com. 281), but not to make new houses or new fences. It is waste in the tenant to cut down fruit trees; but if they are thrown down by tempest, he may afterwards root them up. (2 Roll. Abr. 817.) So it has been held waste for an outgoing tenant to remove a border of box planted by him (*Empson v. Soden*, 4 B. & Ad. 655), or to plough up strawberry-beds in full bearing for which he had paid the person who occupied before him. (*Watherell v. Howells*, 1 Camp. 227.)

Waste may be done in respect of animals, &c., by taking of animals. so many of them as to unstock the park, warren, dove-cote, fish-pond or pool in which they are kept, or by doing any act by reason of which the stock is diminished. (Co. Litt. 53 b.)

A tenant commits permissive waste in omitting to keep the buildings in tenantable repair, as by suffering the house to be uncovered, whereby the timbers decay, or permitting the walls to decay for want of plastering (*Vane v. Barnard*, cited in *Pyne v. Dor*, 1 T. R. 55), or the foundations to be sapped by leaving a moat or ditch unscoured. Merely suffering the house to remain unroofed (provided it were so at the commencement of the tenancy) will not be waste (Co. Litt. 53 a); but then the tenant must take the consequences of any other part thereby becoming ruinous or decayed. To permit walls built to exclude water to remain in such a dilapidated state as to cause the lands to be overflowed and injured, is waste. (Co. Litt. 53 b.)

It is not waste, either voluntary or permissive, to leave land uncultivated (*Hutton v. Warren*, 1 M. & W. 472, per Parke, B.), but it would be bad husbandry.

Waste which increases the value of the property is called meliorating waste.

The landlord's remedy for waste is either by action for damages or for an injunction. An action for waste will lie notwithstanding the act complained of is a breach of

an express covenant in the lease. (*Kinlyside v. Thornton*, 2 W. Bl. 1111.)

Injunction.

An injunction will be granted in a proper case against voluntary waste. (*Kimpton v. Eve*, 2 V. & B. 349; *Hindley v. Emery*, L. R., 1 Eq. 52; 35 L. J., Ch. 6.) But unless there is a negative covenant not to do the act complained of, the Courts will not grant an injunction against meliorating waste, but leave the reversioner to his claim for damages. (*Doherty v. Allman*, 26 W. R. 513; 3 App. Cas. 709; *Meux v. Cobley*, [1892] 2 Ch. 253; 61 L. J., Ch. 449. The *dictum* to the contrary in *Smyth v. Carter*, 18 Beav. 78, is not law.) Neither will an injunction be granted against permissive waste. (*Powys v. Blagrave*, 4 De G. M. & G. 448; 24 L. J., Ch. 142.)

**At whose suit
action will lie.**

Although waste is injury to the inheritance, an action will lie at the suit of the person entitled to the immediate estate in remainder, notwithstanding it may be for life or years only (2 Wms. Saund. 252); but the things severed, whether materials of a house, timber, or the produce of a mine, become the property of the owner of the first estate of inheritance *in esse*. (*Bowles's case*, Tu. L. C. R. P. 111.)

**Against
whom.**

The action will lie against the person committing the waste, whether it be the original tenant or his assign. An action may be brought against the executor of a tenant, for waste committed by his testator within six calendar months before his death. (3 & 4 Wm. 4, c. 42, s. 2.)

**Measure of
damages.**

In an action of waste for injury to the reversion, the measure of damages is the diminished value of the reversion, not the cost of restoring the premises to their previous condition. (*Whitham v. Kershaw*, 16 Q. B. D. 613; 34 W. R. 340; 54 L. T. 124.) When the action is brought by a person having only an estate for life or other limited interest, his right to recover damages is confined to his limited interest. A covenant not to commit waste to a given amount, means waste producing injury to the reversion to that amount. (*Doe v. Bond*, 5 B. & C. 855.)

**Remedies
under 46 & 47
Vict. c. 61.**

By 46 & 47 Vict. c. 61, ss. 6, 7, where a tenant who commits or permits waste claims compensation under that Act, the landlord is entitled to obtain by counterclaim compensation for waste committed or permitted not more than four years before the determination of the tenancy. (See *post*, Chap. IX., Sect. 4.)

SECT. 12.—*Restrictions on Purposes of User of Premises.*

Unless restrained by the terms of his letting, a tenant has the right to use the demised premises for whatever purposes he likes, provided they are not illegal (*Gaslight and Coke Co. v. Turner*, 5 Bing. N. C. 666; 6 *ib.* 324), or immoral (*Girardy v. Richardson*, 1 Esp. 13), and do not create a nuisance. And under an open contract for a lease of property described as “business” premises, the tenant is entitled to a lease under which he can carry on any business, subject only to the restrictions imposed by the general law of the land. (See *Re Davis and Cavey*, 40 Ch. D. 601.)

Restrictions where no express agreement.

Of course, any use involving structural alteration of the premises might be restrained on the ground of waste, provided it was substantial and injurious. (*Doherty v. Allman*, 3 App. Cas. 709.)

If, after it comes to the landlord’s knowledge that the premises are used for an immoral purpose, he permits the tenant to remain in occupation, under circumstances from which it may be inferred that he contemplated receiving payment out of the proceeds of the immorality, he cannot recover for rent, or in respect of any other obligation under the lease. (*Jennings v. Throgmorton*, Ry. & M. 251; *Smith v. White*, L. R., 1 Eq. 626; 35 L. J., Ch. 454.) Yet he cannot forcibly eject the tenant (*Feret v. Hill*, 15 C. B. 207; 23 L. J., C. P. 185), nor, where no breach of covenant is committed, maintain an ejectment on the ground of the purpose for which the premises are used. He may obtain an injunction to restrain the user for an illegal purpose; and where he has merely contracted to let he may refuse possession and justify his breach of contract by the fact that the tenant intended to use the premises for illegal purposes. (*Cowan v. Milbourn*, L. R., 2 Ex. 230; 36 L. J., Ex. 124.)

Landlord’s remedies where premises used for illegal purpose.

A landlord, however, may annex whatever conditions he pleases to his grant, provided they be not illegal or unreasonable. (*Roe v. Galliers*, 2 T. R. 137.) It is customary, therefore, in order to prevent the depreciation of the property demised, or of adjoining property of the lessor, or otherwise to protect the interests of the lessor, to insert negative covenants against the use of the premises either for any business purposes or for specified businesses,

Landlord’s power to impose restrictions.

or affirmative covenants for the use of the premises for a particular trade.

Restrictive covenants—
not void as
perpetuities ;

run with the
land.

Covenant to
carry on a
specific trade
on the pre-
mises,

and no other
trade ;

to keep open
and not forfeit
the licence
of a public-
house ;

A covenant restrictive of the user of premises is not affected by the rule against perpetuities (*Lond. & S. W. Rail. Co. v. Gomm*, 20 Ch. D. 562; 51 L. J., Ch. 530; *Mackenzie v. Childers*, 43 Ch. D. 265), and is not void as being in restraint of trade. (*Earl of Zetland v. Hislop*, 7 App. Cas. 427.) Such a covenant runs with the land. (*Mayor of Congleton v. Pattison*, 10 East, 136; *Fleetwood v. Hull*, 23 Q. B. D. 35; 58 L. J., Q. B. 341; *Wilkinson v. Rogers*, 2 De G., J. & S. 62; 12 W. R. 119, 284.)

A covenant binding the lessee to carry on a specific trade on the premises is valid (*Wadham v. Postmaster-General*, 40 L. J., Q. B. 310; L. R., 6 Q. B. 644); so is a covenant to keep a building open at all times of the year as an inn or a shop for the sale of a particular class of goods. But a covenant not to carry on any other than a certain trade on the premises does not amount to an affirmative covenant to carry on that trade. (See *Doe v. Guest*, 15 M. & W. 160.) Neither is a covenant to use for a given purpose, and not to convert the building to any other use, broken by mere non user. (*Doe v. Churchwardens of Rugeley*, 6 Q. B. 107; 13 L. J., M. C. 137.)

A covenant to use the premises for a certain trade or business, and for no other purpose, is not broken by carrying on other business of practically the same character as that specified. Thus a covenant to use premises as a post office, and not for any other purpose, was held not to be broken by the post office officials doing business of the Inland Revenue Office in receiving excise duties and granting excise licences under the authority of the Postmaster-General, the issuing of such licences being *ejusdem generis* with the issuing of money orders. (*Wadham v. Postmaster-General*, L. R., 6 Q. B. 644; and see *Grand Canal Co. v. M'Namee*, 29 L. R., Ir. 131.) But a covenant to use premises only for a shop would be broken by using them as a beer-shop or tavern. (*Coombs v. Cook*, Cab. & E. 75.)

In the case of a public-house, where it is of importance to bind the lessee not to do anything whereby the renewal of the licence may be imperilled, it is prudent to insert not only a covenant to use and keep open the premises as a public-house, but also to provide for a forfeiture if the lessee "shall commit any offence against the laws for the

time being affecting innkeepers." (*Wooler v. Knott*, 1 Ex. D. 124, 265; 45 L. J., Ex. 313, 884; 24 W. R. 1004.) The mere fact of premises being taken for a public-house would not imply a covenant to use the premises so as not to produce a forfeiture of the licence. (*Maw v. Hindmarsh*, 28 L. T., N. S. 644.) And even an express covenant by the lessee of a public-house that she would not "do, omit, or permit or suffer to be done any act, matter, or thing whatsoever that could or might affect, lessen or make void either or any of the licences for the time being granted to the public-house," was held not to be broken by a conviction under the Licensing Acts which was not indorsed on the licence. (*Wooler v. Knott*, 1 Ex. D. 124, 265; 45 L. J., Ex. 313, 884; *Fleetwood v. Hull*, 23 Q. B. D. 35; 58 L. J., Q. B. 341.) But two indorsed convictions were held to be a breach of a covenant not to do any act whereby the licence can be forfeited or the renewal thereof withheld (*Harman v. Rees*, 65 L. T. 255; 60 L. J., Q. B. 628); and an unindorsed conviction is a breach of a covenant that the lessee will not commit any offence against the laws for the time being affecting innkeepers. (*Wooler v. Knott*, *supra*; 24 W. R. 1004.)

A covenant by a lessee to "use his best endeavours" to bring about or continue a certain state of things is a covenant to do everything usual, necessary, or proper for insuring the success of the endeavours. (*Simpson v. Clayton*, 4 Bing. N. C. 776.) Thus, a covenant by a lessee to use his best endeavours to keep the premises open as a public-house, was held to be broken by the licence being forfeited on account of the disorderly conduct of sub-tenants and the lessee's neglect to do any act to get the licence renewed and the house opened again. (*Linder v. Pryor*, 8 C. & P. 518.) But a covenant by a lessee to "use his best endeavours to extend the custom" of a beer-house does not bind him to live on the premises and continually conduct the business in person. (*Moore v. Robinson*, 48 L. J., Q. B. 156; 40 L. T. 99.)

A covenant to use a house as "a private dwelling-house only" is broken by using it as an office to receive orders for coal, with the words "coal office" exhibited in front (*Wilkinson v. Rogers*, 12 W. R. 119, 284), or by using it as a school (*Wickenden v. Webster*, 25 L. J., Q. B. 264; 6 E. & B. 387), even though for gratuitous education (*German v. Chapman*, 7 Ch. D. 271; 47 L. J., Ch. 250); or as

"to use best endeavours."

Covenant to use premises as a "private dwelling-house only";

a charitable institution not carried on for gain or profit (*Rolls v. Miller*, 53 L. J., Ch. 682; 27 Ch. D. 71), or as an "art studio" for ladies (*Patman v. Harland*, 50 L. J., Ch. 642; 17 Ch. D. 353); but not by a sale by auction of furniture belonging to the house (*Reeves v. Cattell*, 24 W. R. 485), though it would if the furniture was brought there for the purpose of sale. (*Ib.*) A covenant to build "a house fit for a private family and no other" was held to be a continuing covenant, and bound the lessee to keep as well as build the house as a private dwelling-house, and was broken by his converting it into a public-house. (*Bray v. Fogarty*, I. R., 4 Eq. 544.)

If there is a covenant to use the premises as a private residence or private dwelling-house only, the addition of less restrictive words, *e.g.*, "and not for any purpose of trade" will not qualify the generality of the first words. (*German v. Chapman*, *supra*; *Wickenden v. Webster*, *supra*; *Johnstone v. Hall*, 2 K. & J. 414; 25 L. J., Ch. 462.)

not to "convert" into a shop;

Conversion into a shop within the meaning of a restrictive covenant may be effected by using the premises for the purpose of sale without any structural alteration. (*Wilkinson v. Rogers*, 12 W. R. 284.)

not to permit a sale by auction;

A covenant not to permit a sale by auction on the premises was held to be broken where the lessee gave a bill of sale with a power therein for the grantee to sell by auction on the premises, and the grantee exercised the power. (*Toleman v. Portbury*, L. R., 7 Q. B. 344; 41 L. J., Q. B. 98.)

not to carry on any trade or business.

Meaning of "trade" and "business" in restrictive covenants.

The object of restricting the use of the premises to the purposes of a private residence only, may be attained by a covenant against permitting to be carried on upon the premises any trade or business. (*Rolls v. Miller*, 27 Ch. D. 71; 53 L. J., Ch. 682.) The words "trade" and "business," though the language of the covenant may show that they were intended to bear the same meaning, are not synonymous. Every trade is a business, but every business is not a trade; to answer the description of trade, it must be conducted by buying and selling. (*Doe v. Bird*, 2 A. & E. 161.) Business means almost anything which is an occupation or duty, and not a pleasure. (*Rolls v. Miller*, *supra*, *per Lindley*, L. J.) Thus, keeping a school (*Doe v. Keeling*, 1 M. & S. 100; *Kemp v. Sober*, 1 Sim. N. S. 517), or a private lunatic asylum (*Doe v. Bird*, *supra*), or a charitable institution, though used by the public without payment

(*Bramwell v. Lacy*, 10 Ch. D. 691; 48 L. J., Ch. 339; *Rolls v. Miller*, 27 Ch. D. 71; 32 W. R. 806; 53 L. J., Ch. 682), is a business, though not a trade. And a covenant not to use premises for any "occupation or calling" is broken, though the occupation is carried on without any view to gain or profit. (*Portman v. Home Hospitals Association*, 27 Ch. D. 81, n.; 50 L. T. 599, n.) A covenant not to permit any outward show-of business to be affixed, was held to be broken by a wire window-blind inside and a brass plate outside with the name and business on them. (*Evans v. Davis*, 27 W. R. 285; 39 L. T. 391; 10 Ch. D. 747; 48 L. J., Ch. 223.)

Instead of a general covenant against any business there is frequently a covenant against particular trades. This only prohibits those trades actually specified, and implies that other trades may be carried on. (*Tod-Heatly v. Benham*, 40 Ch. D. 83, *per* Kekewich, J.) Thus a stipulation not to convert the premises into a school does not imply a restriction against any other business. (*Van v. Corpe*, 3 My. & K. 269.)

Covenant
against parti-
cular trades.

The rule applicable to such covenants is, that words which at the date of the covenant have an acquired or technical meaning are to be construed according to their acquired meaning at that date, but words which have not acquired any other, are to be construed according to their ordinary meaning, unless the context appears to show that they were not so used. (*London and Suburban Land Co. v. Field*, 16 Ch. D. 645; 50 L. J., Ch. 549.) An extended meaning may be given to a restrictive clause by statute. (See 1 Will. 4, c. 64, s. 31; 23 Vict. c. 27, s. 44.)

Rule of
construction.

"Public-house," "ale-house," and "beer-house" have a technical meaning, but "beer-shop" has not. Thus, while a covenant not to use premises as a "beer-shop" prohibits the sale of beer in any manner whatever, where no more restricted meaning could be assigned to it at the date of the covenant (*Bishop of St. Albans v. Battersby*, 47 L. J., Q. B. 571; 3 Q. B. D. 359; *London and Suburban Land Co. v. Field*, 16 Ch. D. 645; 50 L. J., Ch. 549; *Nicoll v. Fenning*, 19 Ch. D. 258; 51 L. J., Ch. 166), a covenant not to use them as a "beer-house" is not broken if the beer is sold to be consumed off the premises. (*Holt v. Collyer*, 16 Ch. D. 718; 50 L. J., Ch. 311; *London and North Western Rail. Co. v. Garnett*, 39 L. J., Ch. 25; L. R., 9 Eq. 26.) Nor is such a sale a breach of a covenant not to

"Public-
house" and
"beer-house."

use the house "as a public-house for the sale of beer." (*Pease v. Coates*, 36 L. J., Ch. 57; L. R., 2 Eq. 688.) But a covenant not to use the premises as a public-house is broken by use as a beer-house. (1 Will. 4, c. 64, s. 31.)

Seller by
retail of wines
and spirits.

A covenant entered into in 1854 not to carry on the trade or calling of "a seller by retail of wine, beer, spirits, or spirituous liquors"—which in the then state of the law would naturally mean the case of a gin palace bar, or the like—was held not to be broken by a grocer selling wines and spirits across the counter, as that would not have been a selling by retail at the date the covenant was entered into, the power to so sell having been given by a statute passed since (*Jones v. Bone*, 39 L. J., Ch. 405; L. R., 9 Eq. 674; and see *Shoolbred v. St. Pancras, JJ.*, 62 L. T. 287); but such a selling would be a breach of a covenant not to permit the premises to be used for the sale of spirituous liquors. (*Fielden v. Slater*, L. R., 7 Eq. 523; 38 L. J., Ch. 379.) And a covenant against the trade of "a retailer of wines, spirits, or beer" was held to be broken by opening a refreshment bar annexed to a theatre. (*Buckle v. Fredericks*, 44 Ch. D. 244; 38 W. R. 742; 62 L. T. 884.)

Common
brewer.

A covenant not to carry on the trade of a common brewer or retailer of beer is not broken by carrying on the business of a retail brewer. (*Simons v. Farren*, 1 Bing. N. C. 126.)

Vintner.

The business of a vintner includes selling wine, whether wholesale or retail. (*Wells v. Attenborough*, 19 W. R. 465; 24 L. T., N. S. 312.)

Building ap-
parently for
prohibited
purpose.

A person who has covenanted not to use a building for a certain purpose will not be restrained from erecting a building seemingly adapted only for such purpose. (*Worsley v. Swann*, 51 L. J., Ch. 576.)

Partial exer-
cise of prohi-
bited trade.

It is not necessary to constitute a breach, that the tenant should carry on every branch of a prohibited trade; it is sufficient if he partially exercises it; thus, a covenant prohibiting the trade of a butcher is broken by selling raw meat, though not slaughtered on the premises. (*Doe v. Spry*, 1 B. & Ald. 617; *Doe v. Elsam*, Moo. & M. 189.) But a man does not necessarily carry on a particular trade because he deals in articles the sale of which is common to that and other trades. Thus, it was held no breach of a covenant not to carry on the business of a confectioner, for

a grocer and tea dealer to sell a particular kind of sweetmeat in which a confectioner may happen to deal. (*Lumley v. Metropolitan Rail. Co.*, 34 L. T., N. S. 774.)

Nor is it a breach of a covenant against carrying on the business of a ladies' outfitter, or a fancy draper and hosier, to sell some of the things commonly sold by a ladies' outfitter. (*Stuart v. Diplock*, 43 Ch. D. 343; 59 L. J., Ch. 142.)

But a prohibited trade is none the less a breach of the covenant because it is carried on as ancillary to another business. Thus, a refreshment bar in a theatre was held to be a breach of a covenant against the trade of a retailer of wine, spirits, and beer, though the principal business of the defendant was that of a theatrical manager. (*Buckle v. Fredericks*, 44 Ch. D. 244.) And a covenant by the defendants not to use premises as a coffee house would be broken by the defendants, in addition to the business of grocers carried on there, selling on the premises to their customers light refreshments such as are sold at coffee houses. (*Fitz v. Iles*, [1893] 1 Ch. 77.)

Breach may be by mere ancillary business.

The meaning of a covenant not to carry on an "offensive" or "noisome" trade, without enumerating any in particular, would depend in a great measure upon the situation of the premises, and those words would not comprehend any of such trades as were carried on upon the premises at the time of granting the lease. (*Gutteridge v. Munyard*, 7 C. & P. 129.) The trade of a coachmaker is not an "offensive" one (*Bonnett v. Sadler*, 14 Ves. 526); and it is doubtful whether a mock auction can be so considered. (*Moses v. Taylor*, 11 W. R. 81.) A covenant not to carry on any "noisome or offensive" trade was held not to be broken by using the premises for depositing large quantities of lucifer matches; but this would come within the term "dangerous." (*Hickman v. Isaacs*, 4 L. T., N. S. 285.)

"Offensive" trades.

An enumeration of a number of trades and businesses, followed by general words, as "or any other offensive trade," would usually be regarded as limiting those words to trades *ejusdem generis* with the ones enumerated. (*Doe v. Bird*, 2 A. & E. 161.) And it was held that converting a dwelling-house into a public-house was no breach of a covenant not to carry on "any other trade or business that might grow or lead to be offensive or any annoyance or disturbance to any of the lessor's tenants or of the neighbourhood," various other trades having been prohibited,

General words following a specific enumeration.

but that of a licensed victualler not specified. (*Jones v. Thorne*, 1 B. & C. 715.)

"Nuisances." In *Harrison v. Good* (L. R., 11 Eq. 338; 40 L. J., Ch. 294), Bacon, V.-C., held that the word "nuisance" in a covenant by a lessee not to do anything which should be a nuisance to the lessor or his tenants, meant only that which would be an actionable nuisance without the covenant. The correctness of this decision has, however, been questioned. (*Tod-Heatly v. Benham*, 40 Ch. D. 80; 58 L. J., Ch. 83; *Re Davis and Carey*, 40 Ch. D. 606; 58 L. J., Ch. 143.) But in any view, the establishment of a national school is not a "nuisance" (*Harrison v. Good*, *supra*); neither is a brewhouse necessarily a nuisance, though it may be so used as to become one. (*Gorton v. Smart*, 1 Sim. & S. 66.)

"Annoyance and grievance."

"Annoyance" and "grievance" in restrictive covenants are words of wider import than "nuisance," and include anything which reasonably troubles the mind and pleasure of an ordinary sensible person; and the establishment of a hospital for diseases of the throat, nose, ear, skin, and other diseases, was held, on account of the feeling of danger arising from its existence, to be a breach of a covenant against doing any act which might "be or grow to the annoyance, nuisance, grievance, or damage of the lessor, &c." (*Tod-Heatly v. Benham*, *supra*.) But the Courts would not interfere in the case of a trifling, fanciful, or temporary annoyance. (*Everett v. Remington*, 67 L. T. 80.)

Covenants not to carry on trades without licence of the lessor.

Restrictive covenants are often against carrying on particular trades without the licence of the lessor. In such a case permission to carry on one trade will not sanction the carrying on of any other forbidden trade, whether more or less offensive than that licensed. (*Macher v. Foundling Hospital*, 1 V. & B. 188.)

Distance, how measured.

Where there is a covenant by the assignor of a lease of premises used for a particular business, that he will not be concerned in that business within a certain distance of the assigned premises, the distance is to be measured in a straight line, and not along the nearest practicable route. (*Mouflet v. Cole*, L. R., 8 Ex. 32; 42 L. J., Ex. 8.) The same rule would apply to the measurement of distances generally in a restrictive covenant.

Remedies for breach of restrictive covenants.

The lessor's remedies for breach of a restrictive covenant is either by action for damages, by re-entry for forfeiture, or by injunction.

The measure of damages would in the majority of cases be the amount of the diminished value of the reversion from the breach complained of, for generally the object of the covenant is to prevent the depreciation of the letting value of the tenement in the future. (See *Doe v. Spry*, 1 B. & Ald. 619; *Tod-Heatly v. Benham*, 40 Ch. D. 93.) In some cases, the prohibited user is to protect the trade of adjoining premises (*Barret v. Blagrove*, 5 Ves. 555), and in that case the damages would be the actual loss sustained by the lessor. Measure of damages.

The forfeiture created by breach of the covenant may be waived by the acceptance of subsequently accruing rent. This is so where the breach is complete at once, as by converting a house into a shop. But it has been held that in the case of a covenant not to use premises in a prohibited way, there is a continuing breach every day during which the premises are so used, and that the lessor, notwithstanding he has received rent with knowledge of the breach, may maintain ejectment in respect of continued user after the receipt of rent. (*Doe v. Woodbridge*, 9 B. & C. 376.) The authority of this case has, however, been shaken by the cases of *Walrond v. Hawkins* (44 L. J., C. P. 116; L. R., 10 C. P. 342), and *Griffin v. Tomkins* (42 L. T. 359), in the latter of which Cockburn, C. J., expressed an opinion that in the case of a covenant of this description, where the lessor, with full knowledge of the breach, waives the forfeiture by acceptance of rent, it amounts not only to waiver of the past breach, but to a licence to continue the breach in future. Re-entry;

The reservation of an additional rent as well as a proviso for re-entry in the event of a breach of a restrictive covenant, gives the lessee the option to re-enter or demand the increased rent. (*Weston v. Metropolitan Asylum District*, 9 Q. B. D. 404; 51 L. J., Q. B. 399.) right to, not defeated by additional rent.

Relief may be granted against the forfeiture. (44 & 45 Vict. c. 41, s. 14; *Fleetwood v. Hull*, 23 Q. B. D. 35.)

The principles upon which the Court acts in granting an injunction to restrain breaches of covenant have already been considered. (*Ante*, p. 178.) As to an interlocutory injunction, see *Wilkinson v. Rogers* (12 W. R. 284), and *Coles v. Sims* (5 De G., M. & G. 1). Injunction,

The rule previously noticed (*ante*, p. 207), that the infringement of an absolute negative covenant may be restrained by injunction, notwithstanding the reservation notwithstanding penalty.

of a penalty for breach, applies to this class of covenants. Thus, where a lessee covenanted to keep a tenement as a private dwelling-house only, "under a penalty of 10*l.* a year additional rent," it was held that the additional rent was not liquidated damages, and that the lessor was entitled to an injunction to restrain the conversion into a public-house. (*Bray v. Fogarty*, I. R., 4 Eq. 544 (1870).)

Loss of right to enforce restrictive covenants by acquiescence in breaches.

A lessor may lose his right to an injunction by his conduct or omissions, from which acquiescence can be inferred. (*Sayers v. Collyer*, 54 L. J., Ch. 1; 28 Ch. D. 103; *Wiltshire v. Cosslett*, 5 Times L. R. 410); but mere delay is not acquiescence, and the right is not lost by merely lying by and witnessing the act for some time, unless there is an implied assent or the lessor continues inactive so long as to bring the case within the Statute of Limitations. (*Willmott v. Barber*, 49 L. J., Ch. 792; 15 Ch. D. 96; *Fullwood v. Fullwood*, 9 Ch. D. 176; 47 L. J., Ch. 459; *Duke of Northumberland v. Bowman*, 56 L. T. 773; *London, Chatham, and Dover Rail. Co. v. Bull*, 47 L. T. 413.) But if the lessor permit the tenant to expend money in alteration, there would be evidence of his assent to the alteration (*ib.*); and receipt of rent for twenty years, with knowledge of the breach and no objection taken, would raise a presumption of a licence under seal. (*Gibson v. Doeg*, 2 H. & N. 615; 27 L. J., Ex. 37; *Bridges v. Longman*, 24 Beav. 27.) After acquiescence for five years a mandatory injunction to remove buildings erected in contravention of a restrictive covenant will be refused. (*Gaskin v. Balls*, 13 Ch. D. 324; 28 W. R. 552.) Mere acquiescence in trifling breaches will not affect the right to prevent more extensive ones. (*Richards v. Revitt*, 7 Ch. D. 224; 47 L. J., Ch. 472.) Where a lessor lets a number of properties adjoining or forming parts of one estate, under similar restrictive covenants, designed for the benefit of all the tenants, and afterwards waives or relaxes one or more of those covenants in favour of some of the tenants, he and those otherwise entitled to enforce the covenants may lose the right to restrain breaches of the same covenants by other tenants (*Roper v. Williams*, T. & R. 18; *Duke of Bedford v. Trustees of British Museum*, 2 My. & K. 552; *Peck v. Matthews*, L. R., 3 Eq. 515; *Kelsey v. Dodd*, 52 L. J., Ch. 34; and see *Mitchell v. Stevard*, L. R., 1 Eq. 541; 35 L. J., Ch. 393); but only where the whole character of the estate is so changed by the waiver that the object of the covenant is substantially

at an end. (*German v. Chapman*, 7 Ch. D. 271; 47 L. J., Ch. 253, *per James*, L. J.; *Mayor of Plymouth v. Martin*, 78 L. T. Jour. 6; *Kilbey v. Haviland*, 19 W. R. 698.)

A plaintiff does not lose his right to enforce one restrictive covenant because he has himself broken another restrictive covenant part of the same scheme. (*Western v. McDermott*, L. R., 2 Ch. 72; 36 L. J. Ch. 76; *Jackson v. Winnifrith*, 47 L. T. 243; *Chitty v. Bray*, 48 L. T. 860.)

If a covenant is, not to do an act without the consent of the lessor, the latter may release the covenant; but if the covenant is absolute the lessor cannot release it to the prejudice of other lessees who, under the rules hereinafter stated, have acquired the right to enforce it.

Release of restrictive covenant.

Restrictive covenants may be enforced (a) by the lessor; (b) by the person in whom the lessor's reversion may become vested; (c) by a second lessee to whom the lessor has assigned the benefit of the covenant (*Lord Manners v. Johnson*, 1 Ch. D. 673; 45 L. J., Ch. 404; *Clegg v. Hands*, 44 Ch. D. 503; and see *Master v. Hansard*, 4 Ch. D. 718; 46 L. J., Ch. 505); (d) by a second lessee with whom, as well as with the lessor, the lessee has covenanted (see *Buckle v. Fredericks*, 44 Ch. D. 244); and (e) by a second lessee where the land which he has acquired is one of several plots laid out according to a building scheme, and the Court is satisfied that the covenants were intended and understood to be not merely for the protection of the lessor's interests, but for the common advantage of the several lessees. (*Renals v. Cowlishaw*, 9 Ch. D. 125; 11 Ch. D. 866; 48 L. J., Ch. 33, 830; *Nicoll v. Fenning*, 51 L. J., Ch. 166; 19 Ch. D. 258; *Nottingham Patent Brick and Tile Co. v. Butler*, 54 L. J., Q. B. 545; 55 L. J., Q. B. 280; 15 Q. B. D. 261, 269; 16 Q. B. D. 778; *Collins v. Castle*, 36 Ch. D. 243; 57 L. J., Ch. 76; *Spicer v. Martin*, 14 App. Cas. 12; 58 L. J., Ch. 309; *Mackenzie v. Childers*, 43 Ch. D. 265; *Re Birmingham, &c. Land Co. and Allday*, [1893] 1 Ch. 342; 67 L. T. 850.) And it is a question of fact in each case whether the covenants were merely for the protection of the lessor, or were meant for the common advantage of the several lessees. (*Sheppard v. Gilmore*, 57 L. J., Ch. 6; *Everett v. Remington*, 67 L. T. 80; [1892] 3 Ch. 148.) The mere fact of exhibiting to the lessee a plan of the estate, showing it as laid out in plots, does not justify the assumption of a building scheme with like covenants applicable to each lot. (*Tucker v.*

Who may enforce restrictive covenants:

Voules, 41 W. R. 156; [1893] 1 Ch. 195.) And a lessee is not entitled under this rule to enforce restrictive covenants of the existence of which he was not aware at the time of his lease. (*Keates v. Lyon*, L. R., 4 Ch. 218; 38 L. J., Ch. 357; *Master v. Hansard*, 4 Ch. D. 718; 46 L. J., Ch. 505.)

The lessee may enforce restrictive covenants by obtaining an injunction to restrain the lessor from granting a lease of another plot free from the restriction. (*Mackenzie v. Childers*, *supra*; *Spicer v. Martin*, *supra*.)

Upon the sub-division of a plot subject to restrictive covenants, the owner of one part of the plot cannot enforce the covenants against the owner of the other part. (*King v. Dickeson*, 40 Ch. D. 596; 58 L. J., Ch. 464.)

covenantee
who has
parted with
his estate;

A lessor who has parted with his interest in the property may enforce restrictive covenants where he has made himself liable to other lessees in case the covenant should be infringed. (*Spencer v. Bailey*, 94 L. T. Jour. 508.)

covenantor
who has
parted with
his estate;

If the original covenantor has parted with all his interest and is in no way in fault, he is not properly made a defendant to an action to restrain a breach of a restrictive covenant. (*Clements v. Welles*, L. R., 1 Eq. 200.)

occupier with-
out estate.

A mere occupier without any estate in the premises, with notice of the covenant, is liable to an injunction to restrain him from using the property in a forbidden way. (*Mander v. Falcke*, [1891] 2 Ch. 554.)

Covenants by
landlord
giving tenant
a trade
monopoly.

When the lessor covenants not to carry on or allow to be carried on certain trades on his adjoining land, or that a lessee shall have the exclusive right to exhibit and sell a certain class of goods upon the lessor's estate, an injunction will lie against him for carrying on or allowing the specified trades, or permitting the exhibition and sale of such goods by other tenants. (*Altman v. Royal Aquarium Society*, 3 Ch. D. 228; *Jay v. Richardson*, 31 L. J., Ch. 398; 30 Beav. 563.)

A personal covenant by the landlord, not in terms extended to bind his assigns, that he will not let adjoining premises for carrying on a specific trade intended to be carried on by the tenant, does not bind the person to whom he may let those adjoining premises not to carry on that particular trade; nor is the covenant broken if the landlord does not let specifically for the purpose of that particular trade (*Kemp v. Bird*, 46 L. J., Ch. 828; 5 Ch. D. 974; and see *Master v. Hansard*, 46 L. J., Ch. 505;

4 Ch. D. 718); neither, in such case, is a covenant which only binds the lessor "not to consent" to a trade being carried on. (See *Stuart v. Diplock*, 43 Ch. D. 343.)

In addition to the restrictions as to the user of the premises imposed upon the tenant by the terms of his lease, there is the further legal restriction, imposed by law, to so use the premises as not to cause a nuisance to his neighbours. A nuisance is defined as "an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain, sober, and simple notions among the English people." (*Walter v. Selfe*, 4 De G. & Sm. 322; 20 L. J., Ch. 433; *Ball v. Ray*, L. R., 8 Ch. 467; 21 W. R. 282; *Broder v. Saillard*, 2 Ch. D. 692; 24 W. R. 1011; *Heather v. Pardon*, 37 L. T., N. S. 393; *Reinhardt v. Mentasti*, 42 Ch. D. 685). And if a man bring on his premises or collect or keep there that which in a natural state would not be there (such as water or filth), and which will do mischief to his neighbours in case it escape on to their land, and it does in fact escape without any default of the neighbours, he will *primâ facie* be answerable for any injury done. (*Rylands v. Fletcher*, L. R., 3 H. L. 330; 37 L. J., Ex. 161; *Tenant v. Golding*, 1 Salk. 21, 360; *Snow v. Whitehead*, 53 L. J., Ch. 885; 27 Ch. D. 588.) An occupier of land adjoining a meadow where cattle are pastured who grows a tree likely to be eaten by cattle, must keep it within his own boundaries, otherwise he is *primâ facie* liable for the loss of cattle poisoned thereby. (*Crowhurst v. Amersham Burial Board*, 4 Ex. D. 5; 48 L. J., Ex. 109.) And an occupier of land is liable to his neighbour for injury to cattle as the natural result of the character of a fence erected. (*Firth v. Bowling Ironworks Co.*, 3 C. P. D. 254; 47 L. J., C. P. 358.) If a man overstock his land with game bred elsewhere he will be liable to his neighbours for injury the latter may sustain therefrom. (*Farrer v. Nelson*, 54 L. J., Q. B. 385; 15 Q. B. D. 258.) But an occupier is not liable for the natural growth of the soil, and there is no duty, as between adjoining occupiers, to cut thistles and prevent them seeding. (*Giles v. Walker*, 24 Q. B. D. 656; 38 W. R. 782.)

Restrictions
by law as
regards
neighbours.

Artificial
additions to
the soil.

Overstocking
land with
game.

Natural
growths—
thistles.

The tenant is not liable for damages the consequence of *vis major* (*Box v. Jubbs*, 48 L. J., Ex. 417; 41 L. T. 97), or the inevitable result of what is authorized by statute.

Vis major.

(*Dixon v. Metropolitan Board of Works*, 50 L. J., Q. B. 772; 71 Q. B. D. 418.)

SECT. 13.—“*Tied Houses.*”

Contract to deal exclusively with particular person,

A landlord may impose upon his tenant the obligation to deal exclusively with a particular person, and such contracts are not illegal as being in restraint of trade. (*Catt v. Tourle*, 38 L. J., Ch. 401, 665; L. R., 4 Ch. 654.)

in leases of public-houses,

Covenants of this class, though occasionally met with in leases of other property (see *Wight v. Dicksons*, 1 Dow, 141; *Vyryan v. Arthur*, 1 B. & C. 410), are more common in leases of public-houses, stipulating that the landlord or a particular brewer shall have the exclusive right to supply all beer, &c., sold on the premises. The Courts take judicial notice of the difference between a public-house let subject to this kind of covenant, which is called a brewer's or “tied,” and a “free” public-house. (*Catt v. Tourle*, *supra*.) And a purchaser of a “free public-house” is entitled to throw up the contract and recover his deposit, if the property turns out to be a “tied” house. (*Jones v. Edney*, 3 Camp. 285; *Hartley v. Pehall*, Peake, N. P. 131.)

A stipulation giving the landlord the same right to distrain for unpaid liquor as for rent in arrear would be void unless complying with the Bills of Sale Acts. (*Pulbrook v. Ashby*, 56 L. J., Q. B. 376; *Stevens v. Marston*, 64 L. T. 274.)

only enforceable if lessor supply proper commodity.

Covenants of the description we are now considering as to beer, &c., cannot be enforced unless the brewer supply the lessee with good beer (*Holcombe v. Hewson*, 2 Camp. 391; *Thornton v. Sherratt*, 8 Taunt. 529; *Cooper v. Twibill*, 3 Camp. 286, n.; *Luker v. Dennis*, 7 Ch. D. 227; 47 L. J., Ch. 174), and beer of the class which he requires. (*Edwick v. Hawkes*, 18 Ch. D. 199; 50 L. J., Ch. 577.) And the quality cannot be proved by showing that the brewer supplied good beer to other publicans during the same period. (*Holcombe v. Hewson*, *supra*.)

If the commodity supplied is good, but not sufficient in quantity, the lessee may purchase from others, but only to the extent of the deficiency. (See *Wight v. Dicksons*, 1 Dow, 141.)

The covenant is satisfied by the lessee buying as an undisclosed principal through an agent. (*Edwick v. Hawkes*, *supra*.)

Buying
through an
agent.

The better opinion seems to be that such a covenant runs with the land (*Clegg v. Hands*, 44 Ch. D. 503 ; 62 L. T. 502 ; 38 W. R. 433), though the point has been the subject of conflicting views. (*Keppell v. Bailey*, 2 My. & K. 517, 545 ; *Catt v. Tourle*, L. R., 4 Ch. 654.)

Covenant
runs with
land.

It is a nice question how far a covenant in a lease, to trade with the landlord in a certain business, can be enforced after the business and the reversion in the demised premises have been assigned to different persons, or the assigns of the business have ceased to carry it on at the place where it was carried on at the date of the covenant. In *Vyryan v. Arthur* (1 B. & C. 415), the lessee covenanted to grind all corn grown on the demised farm at the lessor's mill, and an action having been brought upon the covenant by the devisee of the lessor, the Court decided that the action lay, entirely upon the ground that the mill and the reversion in the farm continued united in the same person. In *Doe v. Reid* (10 B. & C. 849), the lessee of a public-house covenanted to take all beer from the lessors, their assigns or successors, in their late or present trade as brewers, and the lessors having transferred the business and the reversion of the public-house to other brewers, who removed the plant of the business to a distance of two miles and there carried on the business of brewers, it was held that the covenant was at an end, as the assignees, by removal, had ceased to be successors of the business. But in *Clegg v. Hands* (44 Ch. D. 503 ; 59 L. J., Ch. 477), where a lease of a public-house contained a covenant by the lessee not to sell ales, &c., other than such as should have been bought from the lessors (who were brewers), or their assigns, "provided they or he shall at such time deal in or vend such liquors as aforesaid, and shall be willing to supply the same to the lessee of good quality and at fair current market prices," it was held that this covenant enabled the assignee of the reversion of the public-house, to whom the benefit of the covenant was expressly assigned, to sue, though he was not the assignee of the lessor's brewery which had been sold to another person who ceased to use it as a brewery.

Whether
limited to
time business
and reversion
united in
same person.

The usual remedy relied upon is an injunction to restrain the lessee from selling beer, &c., other than that purchased

Remedy—
injunction.

from the plaintiff. (*Clegg v. Hands, supra*; *Brandon v. Bernhardt*, 30 Sol. J. 753; Seton, 465.)

Very often the lease contains not only an express covenant that the lessee will not purchase beer from anyone else than the lessor, but also a proviso for a reduced rent so long as he does so purchase it. This does not entitle the lessee to break the covenant on paying the higher rent. (*Hanbury v. Cundy*, 58 L. T. 155, *ante*, p. 207.)

SECT. 14.—*Restrictions as to Occupation and Alienation.*

Common law
right of
alienation.

A tenancy at sufferance is not alienable (*ante*, p. 2), and any attempted assignment or underlease by a tenant at will determines his tenancy if the lessor have notice. (*Ante*, pp. 3, 4.) With these exceptions, and unless expressly restrained by the terms of the letting, every tenant, including a tenant from year to year (*ante*, p. 4), has, as incident to his estate, the right to assign or sub-let the premises.

Restrictions
on alienation
not "usual."

A covenant restraining the right to assign or underlet the premises is not a "usual" one to be inserted in a lease in the absence of express stipulation (*Church v. Brown*, 15 Ves. 271, *ante*, p. 129), not even in the lease of a public-house. (*Re Lander and Bagley's Contract*, [1892] 3 Ch. 41; 67 L. T. 521.)

Alienation
restrained by
express
stipulation.

The *primâ facie* right to assign or underlet may be restrained by a proviso, condition, or covenant. Such a restraint is legal, provided it does not infringe the rule against perpetuities. (*Roe v. Galliers*, 2 T. R. 140.) The restraint may be either absolute or conditional upon the licence of the landlord. If a lease to a man, his executors, administrators *and assigns*, contain an absolute proviso against alienation, it is repugnant to the premises, and will be rejected (Shep. Touch. 123, n.), though it would be good if the word "assigns" was omitted, or if the restraint was against alienation without consent. (*Weatherall v. Geering*, 12 Ves. 511.)

Difference
between
covenant and
condition.

If a term is granted subject to a condition against assignment, an assignment by the lessee will be void; but if the restraint is by covenant only, the lessee, by assigning, commits a breach of covenant, but the assignment itself is not void. (*Paul v. Nurse*, 8 B. & C. 488, *per* Holroyd, J.) And while a clause in an instrument of tenancy whereby

it was "stipulated and conditioned" that the tenant would not assign or underlet was held to give a right of re-entry on breach (*Doe v. Watt*, 8 B. & C. 308); a mere breach of an agreement not to assign or underlet was held not to give such a right. (*Shaw v. Coffin*, 14 C. B., N. S. 372; *Crauley v. Price*, L. R., 10 Q. B. 302; 33 L. T. 203.)

A lease to a man for a term of years if, or on condition that, he shall so long continue to occupy the land personally, is unobjectionable (*Roe v. Galliers*, 2 T. R. 140); and the term will end if he cease to live there from whatever cause. (*Doe v. Clarke*, 8 East, 185; *Doe v. Hawke*, 2 East, 481.)

Personal occupation of premises.

A covenant by a lessee that he and his family will reside on or occupy the premises during the continuance of the term is valid (*Ponsonby v. Adams*, 2 Bro. P. C. 431), but is not "usual." (*Re Lander and Bagley's Contract*, [1892] 3 Ch. 41.) A stipulation not to suffer "any part" of the premises to be "occupied" by any other person, was held to be broken by the tenant permitting persons, according to the custom of the country, to use small portions of the land for the purpose of raising a crop of potatoes. (*Green-slade v. Tapscott*, 1 Cr. M. & R. 55; 3 L. J., Ex. 328.)

A covenant to reside on the premises runs with the land and is binding upon assigns though not named. (*Tatem v. Chaplin*, 2 H. Bl. 133.)

A general covenant not to assign or otherwise part with the possession of the premises, is only broken by a voluntary act of the lessee vesting the term in another (*Doe v. Bevan*, 3 M. & S. 357), and not by those acts of assignment which pass against the lessee *in invitum* (*Adams, Eject.* 137), as where the term vests without specific bequest in the executors or administrators of the tenant, though, if named in the covenant, they could not assign without consent. (*Roe v. Harrison*, 2 T. R. 425; *Lloyd v. Crispe*, 5 Taunt. 249.) Neither is it broken by the bankruptcy of the tenant (*Doe v. Bevan*, 3 M. & S. 353; *Weatherall v. Geering*, 12 Ves. 504) by which it vests in his trustee; or by a subsequent assignment by the trustee (*Doe v. Bevan*, *supra*; but see *Dyke v. Taylor*, 2 Giff. 566); nor by an execution, unless suffered for the purpose of evading the covenant (*Doe v. Carter*, 8 T. R. 57, 300; *Croft v. Lumley*, 6 H. L. C. 672); or a compulsory sale to a railway or other company. (*Baily v. De Crespigny*, L. R., 4 Q. B.

General covenant against assignment, &c. only broken by voluntary alienation.

180; *Slipper v. Tottenham, &c. Rail. Co.*, 36 L. J., Ch. 841; L. R., 4 Eq. 112.)

Whether
broken by
bequest.

The authorities are conflicting as to whether the covenant is broken by a bequest of the term; but the balance of authority seems to be that it is not. (*Fox v. Swann*, Sty. 483; *Crusoe v. Bugby*, 3 Wils. 234; *Doe v. Bevan*, 3 M. & S. 361; 2 Platt. 258; 2 Williams Exors. 940, n.) If however the stipulation is against disposing of the premises by will or otherwise, it is broken by a bequest to the executors, although in that character only. (*Parry v. Herbert*, 4 Leon. 5.)

Express
stipulations
against
involuntary
alienation,

Assignments by operation of law may be restrained by express stipulations containing apt words. Therefore, a stipulation for the determination of the lease in the event of the tenant's bankruptcy (*Church v. Brown*, 15 Ves. 268; *Doe v. Bevan*, 3 M. & S. 359; *Ex parte Gould, re Walker*, 13 Q. B. D. 454), or in the event of his committing an act of bankruptcy (*Roe v. Galliers*, 2 T. R. 133), or of the term being taken in execution (*Doe v. Carter*, 8 T. R. 61; *Rex v. Topping*, M'Cl. & Y. 544) is valid.

apply only to
the person
having the
estate.

Such stipulations apply only to acts committed by the person who is tenant for the time being. Thus, a lease contained a stipulation against assignment without consent, and a proviso for re-entry if "the lessee, his executors, administrators, or assigns should become bankrupt." The lessee, with the consent of the lessor, assigned the lease, and became bankrupt. It was held that no forfeiture was incurred. (*Smith v. Gronow*, [1891] 2 Q. B. 394; 60 L. J., Q. B. 776.)

Construction
of covenant.

All restraints upon alienation are looked upon with disfavour by the Courts, which will not construe the restraint to go beyond the express stipulation. (*Church v. Brown*, 15 Ves. 265; *Doe v. Carter*, 8 T. R. 61; *Doe v. Ingleby*, 15 M. & W. 465.) Therefore, in construing covenants, &c., of this class, it has been held that an assignment means a complete alienation of the entire legal interest of the tenant in the premises. (*Corporation of Bristol v. Westcott*, 12 Ch. D. 461; 41 L. T. 117.) An underlease for part of the term is not an assignment (*Crusoe v. Bugby*, 2 W. Bl. 766), but if the tenant part with the whole of his term, whether absolutely or by way of mortgage, it is an assignment, though in form an underlease. (*Beardman v. Wilson*, L. R., 4 C. P. 57; 38 L. J., C. P. 91.) A covenant against assignment is not broken by an

"Assign-
ment."

advertisement for sale of the term (*Gourlay v. Duke of Somerset*, 1 V. & B. 68), or by an agreement for an assignment followed by possession, but without a formal assignment (*West v. Dobb*, L. R., 5 Q. B. 460; 39 L. J., Q. B. 190; *Church v. Brown*, 15 Ves. 265), or by an assignment, for the benefit of creditors, which is set aside as an act of bankruptcy (*Doe v. Powell*, 5 B. & C. 308;—but otherwise if the assignment is unimpeached, *Holland v. Cole*, 1 H. & C. 67; 31 L. J., Ex. 481), or a mere equitable mortgage by deposit not accompanied by change of possession. (*Bousser v. Colby*, 1 Hare, 109; *Doe v. Laming*, Ry. & M. 36; *Ex parte Drake*, 1 M. D. & De G. 539.)

A covenant not to underlease is broken by a letting from year to year. (*Timms v. Baker*, 49 L. T. 106.) In *Doe v. Laming* (4 Camp. 73), it was held at *nisi prius* that letting lodgings was not a breach of a covenant not to underlet any part of the premises. The ruling has been questioned (*Greenslade v. Tapscott*, 1 Cr. M. & R. 55; 3 L. J., Ex. 328), and is in conflict with a decision of the previous year in which a proviso for re-entry in case the tenant should demise, lease, or let the premises or any part thereof was held to give the right to re-enter where the tenant entered into a partnership arrangement by which the incoming partner had *exclusive* possession of one room. (*Roe v. Sales*, 1 M. & S. 297.) A covenant not to use the rooms of a house for any other purpose than bed or sitting rooms for the tenant or his family was held to be broken by letting to a lodger. (*Doe v. Woodbridge*, 9 B. & C. 376.) A covenant not to underlet for more than a year is not broken by a lease for a year to commence *in futuro*. (*Croft v. Lumley*, 6 H. L. C. 672.)

It is doubtful whether a covenant not to underlet would be broken by an assignment, but a covenant not to “let, set, or demise” the premises, or any part thereof, for all or any part of the term, prohibits either an assignment or an underlease. (*Greenaway v. Adams*, 12 Ves. 395; *Roe v. Harrison*, 2 T. R. 425.)

To prevent a tenant evading the restriction against alienation by putting another in possession without either an assignment or an underlease, the covenant often prohibits the tenant from parting with the possession of the premises. (See *West v. Dobb*, L. R., 5 Q. B. 460; 39 L. J., Q. B. 190.) These words, however, when collocated with words signifying assignment only, may be construed

“Under-
letting.”

“Not part
with posses-
sion.”

as parting with possession for the whole of the term. (*Crusoe v. Bugby*, 2 W. Bl. 766; *Doe v. Laming*, Ry. & M. 36.) But a stipulation not to assign or otherwise part with the premises, or any part thereof, for the whole or any part of the term, was held to prohibit an underlease. (*Doe v. Worsley*, 1 Camp. 20.) And, generally, where a tenant undertakes not to do or permit any act of alienation, he will be held to have broken his undertaking when he does any act the legal effect of which is that alienation is the result. (*Davis v. Eyton*, 7 Bing. 154; *Re Throckmorton, Ex parte Eyton*, 7 Ch. D. 145; 47 L. J., Bkcy. 62.)

A covenant not to part with the possession of the premises is not broken by parting with the possession of a part (*Church v. Brown*, 15 Ves. 265), for a mere temporary purpose, as, where a tenant allowed a travelling theatre for a small weekly payment to enter upon a field included in the demise. (*Mashiter v. Smith*, 3 Times L. R. 673.)

Assignment
by one joint-
tenant to
another.

Where a lease containing a covenant not to assign without consent became vested by assignment in joint tenants, it was held a breach of the covenant for one of the joint tenants to assign all his interest to the other. (*Varley v. Coppard*, 20 W. R. 972; L. R., 7 C. P. 505.) But in *Corporation of Bristol v. Westcott* (12 Ch. D. 461; 41 L. T. 117), there was a lease to two partners of business premises, with a covenant that they or either of them would not assign or "part with the possession" of the premises to any person or persons without the consent of the lessor. The partnership was dissolved, and it was agreed that the one partner should assign to the other his interest in the premises. The latter was let into sole possession, but no assignment was executed, and it was held no breach of the covenant, the Court reading "any person" as meaning any other person than the two named.

Licence to
assign.

The common restriction is against alienation without consent. Where a consent is required to be in writing, an oral one is not sufficient (*Roe v. Harrison*, 2 T. R. 425; *Willmott v. Barber*, 15 Ch. D. 96; 28 W. R. 911) unless given with the fraudulent intention of inducing the lessee to commit a forfeiture. (*Richardson v. Evans*, 3 Madd. 218.)

No fine to be
exactd for a
licence to
assign.

In all leases containing a covenant, condition, or agreement against assigning, underletting, or parting with the possession, or disposing of the land or property leased, without licence or consent, such covenant, condition or agreement shall, unless the lease contains an expressed

provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent; but this proviso shall not preclude the right to require the payment of a reasonable sum in respect of any legal or other expenses incurred in relation to such licence or consent. (55 & 56 Vict. c. 13, s. 3.) This prevents a practically arbitrary refusal by exacting a money-payment. (See *Hilton v. Tipper*, 18 L. T. 626.)

It is not unusual to add to the covenant a stipulation against an arbitrary withholding of the consent. If the covenant stipulate that the consent shall not be withheld when the proposed assignment or underlease is to a respectable or responsible person, consent is unnecessary in the case of an assignment to a person who answers that description (*Hyde v. Warden*, 3 Ex. D. 72; 47 L. J., Ex. 127), and need not be asked for. (*Burford v. Unwin*, 1 Cab. & E. 494.) Where however the stipulation is that the consent shall not be "arbitrarily" or "unreasonably" withheld, the lessee must apply for the lessor's consent, or he commits a forfeiture (*Barrow v. Isaacs*, [1891] 1 Q. B. 417; 39 W. R. 338; 60 L. J., Q. B. 179); but if the consent is withheld unreasonably, the lessee may assign without consent. (*Treloar v. Bigge*, L. R., 9 Ex. 151; 43 L. J., Ex. 95; *Sear v. House Property & Investment Co.*, 16 Ch. D. 387; 50 L. J., Ch. 77.) As to what is an "arbitrary" or "unreasonable" refusal, see *Treloar v. Bigge* (*supra*); *Governors of Bridewell Hospital v. Fauckner* (93 L. T. Jour. 127); *Lehmann v. M^r Arthur* (L. R., 3 Eq. 746; 15 W. R. 551); *Harrison v. Corporation of Barrow-in-Furness* (63 L. T. 834; 39 W. R. 250). If there is a covenant that the consent shall not be withheld except on reasonable objection, and a heavy rent is reserved, a strong ground for refusal must be shown. (*Sheppard v. Hong Kong Banking Corporation*, 20 W. R. 459.) In *Harrison v. Corporation of Barrow* (*supra*), a corporation was held not to be a "person" of responsibility or respectability. The word person may however for many purposes include a corporation. (*Re Jeffcock's Trusts*, 51 L. J., Ch. 507.)

"Consent not to be withheld to a responsible person."

"Not to be arbitrarily withheld."

"Reasonable objection."

A consent to an assignment is binding notwithstanding the lessor may die (Co. Litt. 52 b) or part with his reversion (*Walker v. Ballamie*, Cro. Jac. 102) before the assignment is executed.

Where a lease to A. contains a covenant not to assign Consents to

alienation by
sub-lessee.

or underlet without consent, and A. with consent agrees to underlet part of the property to B., upon "the like provisions and conditions" as are contained in A.'s lease, the underlease ought to be framed so as to require the consent of A. only, and not of the original landlord to any assignment, &c. by B. (*Williamson v. Williamson*, L. R., 9 Ch. 729; 43 L. J., Ch. 738); but it may be so framed as to make the consent of both necessary. (*Haywood v. Silber*, 34 W. R. 114; 30 Ch. D. 404; 54 L. T. 108.)

Who to pro-
cure consent.

It is the duty of the lessee and not of the purchaser or underlessee to procure the consent (*Lloyd v. Crispe*, 5 Taunt. 249; *Mason v. Corder*, 7 Taunt. 9; *Hilton v. Tipper*, 18 L. T. 626); but he need not take legal proceedings to obtain the consent (*Lehmann v. M'Arthur*, L. R., 3 Ch. 496; 37 L. J., Ch. 625); and it will be sufficient if the consent is obtained before the time fixed for completion. (*Ellis v. Rogers*, 29 Ch. D. 661; 53 L. T. 377.) But if not then obtained the assignee may cancel the agreement, which will not then be binding though the consent be subsequently obtained. (*Forrar v. Nash*, 35 Beav. 167.)

Position of
one who
enters and
no consent
obtained.

If the intended assignee or sub-lessee enter into possession and no consent is obtained, he may leave without giving a notice to quit or becoming liable for rent after he has left. (*Crouch v. Tregoning*, 41 L. J., Ex. 97; L. R., 7 Ex. 88.) But a person who comes in and holds under an assignment or sub-lease—contravening a covenant not to assign or sub-let—is nevertheless bound by the stipulations in the lease, which the landlord can therefore enforce against him. (*Silcock v. Farmer*, 46 L. T. 404.)

Licence
restricted to
specific matter
authorized.

Any licence to assign, underlet or do any act which without such licence would create a forfeiture or give a right to re-enter under a condition or power in the lease, shall, unless otherwise expressed, extend only to the matter specifically authorized to be done, leaving intact all rights under covenants and powers of forfeiture and re-entry in respect of any subsequent breach of covenant or condition, assignment, underlease or other matter not specifically authorized. (22 & 23 Vict. c. 35, s. 1.) And a licence given to one of several lessees to assign or underlet his share, or do any other act prohibited to be done without licence, or given to any lessee or any one of several lessees to assign or let part only, or do such prohibited act as aforesaid in respect of part only of the property, shall not destroy the right of re-entry on breach of covenant or

Licence to
one of several
co-lessees.

condition by the co-lessees or by the lessee in respect (as the case may be) of remaining shares or property. (Sect. 2; and see *Dumpro's Case*, 1 Smith, L. C. 43, 9th ed.)

A covenant against assignment or sub-letting without consent runs with the land. (*Williams v. Earle*, L. R., 3 Q. B. 739; 37 L. J., Q. B. 231.)

Covenant
against
assignment
runs with
the land.

It is not sufficient *prima facie* evidence of an assignment, sub-letting, or parting with possession that a stranger is found in possession of the premises, since he may be a mere trespasser. (*Doe v. Payne*, 1 Stark. 86.)

Evidence of
assignment.

Where there is a covenant not to assign, and a proviso for re-entry on breach of covenant, the lessor may sue for damages or bring an action for ejectment. An injunction will not be granted against an assignment without licence unless some irreparable injury is likely to result. (*Dyke v. Taylor*, 3 De G., F. & J. 467.)

Remedies.

The measure of damages for breach of the covenant, is such a sum as will put the plaintiff in the same position as if he had still the defendant's liability, instead of the liability of one of inferior pecuniary means, for past and future breaches. (*Williams v. Earle*, L. R., 3 Q. B. 739; 16 W. R. 1041.) Other damages naturally arising from the breach may be recovered, and where a tenant sub-let to enable the sub-lessee to carry on a dangerous business and the premises were burnt down by a fire arising from such business, the loss caused by the fire was held recoverable as damages. (*Lepla v. Rogers*, [1893] 1 Q. B. 31.)

Measure of
damages.

Re-entry is the remedy usually preferred, on account of the difficulty of proving damages.

Re-entry for
forfeiture.

There is no relief against a forfeiture caused by breach of a covenant or condition against assigning, underletting, or parting with the possession of the premises leased. (*Hill v. Barclay*, 18 Ves. 63; 44 & 45 Vict. c. 41, s. 14, sub-s. 6 (i.); *Barrow v. Isaacs*, [1891] 1 Q. B. 417.) But forfeiture in this case, as upon any other breach, may be waived. (*Infra*, Chap. VIII.)

SECT. 15.—*Insurance.*

Covenant to insure.

A lease often contains a covenant on the part of the lessee to insure. It is customary to name the office, but a covenant "to insure and keep insured during the term in some sufficient insurance office," or in some "respectable" office, without naming the office, is not void for uncertainty. (*Doe v. Shewin*, 3 Camp. 134; *Doe v. Gladwin*, 6 Q. B. 953; 14 L. J., Q. B. 189.) The covenant frequently requires the moneys received to be applied in reinstating the premises. As to the rights of the parties to have the moneys so applied in the absence of such a covenant, see *ante*, p. 191.

"Full value."

When the amount of the insurance is not fixed, it is expressed as the full value (*Doe v. Peck*, 1 B. & Ad. 428), or some proportion thereof. (*Doe v. Shewin*, *supra*.) In such a case, full value does not mean the saleable value, but such a sum as would suffice to replace the buildings with others exactly similar. (5 Dav. Conv. 152, n.)

And produce policy and receipts.

The covenant should make it imperative on the lessee to produce the policy and receipts for the premiums when called upon, otherwise it is almost impossible for the lessor to succeed in an ejectment for non-insurance. (*Doe v. Whitehead*, 8 A. & E. 571.)

Covenant runs with the land.

A covenant to insure and expend all insurance moneys received in rebuilding or reinstating the premises runs with the land. (*Vernon v. Smith*, 5 B. & Ald. 9; 2 Platt, 226.)

How broken.

A covenant to insure does not bind the lessee to insure before the lease is executed, and an insurance within a very short time after would seem to be a compliance with the covenant (*per* Patteson, J., *Doe v. Ulph*, 18 L. J., Q. B. 106; 13 Q. B. 204); and a covenant to insure in an office to be named by the lessor does not create any liability until the office is named (*Lillie v. Legh*, 3 De G. & J. 204); but, subject to this qualification, the covenant is broken by the premises being left uninsured for any part, however small, of the term, even though no fire occur, and proper insurances be afterwards effected. (*Doe v. Shewin*, *supra*; *Penniall v. Harborne*, 11 Q. B. 368; 17 L. J., Q. B. 94; *Wilson v. Wilson*, 14 C. B. 616; 23 L. J., C. P. 137.) So if the covenant be to insure in the joint names of the lessor and lessee, and the insurance be in the name of the lessee

alone, the covenant is broken (*Doe v. Gladwin*, 6 Q. B. 953; 14 L. J., Q. B. 189; *Green v. Lou*, 22 Beav. 625); and a covenant to insure in the name of the lessor alone is broken by the lessee adding his own name. (*Penniall v. Harborne*, *supra*.) But a covenant to insure in the joint names of the lessor and lessee, is well performed by insuring in the name of the lessor alone. (*Havens v. Middleton*, 22 L. J., Ch. 746; 10 Hare, 641.) It is not necessary the original policy be kept on foot provided the premises are always kept insured.

The breach of a covenant to insure continues so long as a state of things exists inconsistent with the terms of the covenant, and waiver of a breach by receipt of rent applies only to what is past. (*Doe v. Gladwin*, 6 Q. B. 953.) Continuing breach.

If an action is brought for breach of covenant to insure, and the lessor has paid the insurance premium, he may recover that as damages, no other special loss having occurred (*Hey v. Wyche*, 12 L. J., Q. B. 83); after a loss has occurred, the measure of damages is the value of the property destroyed which ought to have been insured. (*Ex parte Bateman*, 25 L. J., Bkcy. 19.) Measure of damages.

The Courts have power to relieve against a forfeiture for breach of a covenant to insure, under the 14th section of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41, *infra*, Chap. VIII.) Forfeiture for breach relieved against.

SECT. 16.—*Rates and Taxes.*

The payment of rates and taxes falls, in the first instance, upon the tenant, as in no case is the landlord directly liable to pay them. (*R. v. Mitcham*, 1 Doug. 226, n.) How borne.

Certain taxes, generally called "landlord's taxes," the tenant is entitled, in the absence of an agreement to the contrary, to recover from the landlord or deduct from his next rent. The chief of these are property tax, tithe rent-charge, land tax, and sewers rates. But even these (with the exception of the property or income tax and tithe rent-charge) may, by the agreement of the parties, be thrown upon the tenant. So may assessments imposed by local and sanitary authorities in respect of permanent improvements. Landlord's taxes.

Property tax.

The liability to bear property tax may not be altered by direct contract. It is to be borne by the owner, and if the occupier pay it, he may deduct it from his *next* payment of rent, and the landlord must allow the deduction under a penalty of 50l.; and any stipulation between landlord and tenant for payment of rent in full, without allowing such deduction, will be void (5 & 6 Vict. c. 35, ss. 73, 103; *Gaskell v. King*, 11 East, 165), so far as it relates to the property tax; though valid as to other taxes named. (*Fuller v. Abbott*, 4 Taunt. 105.) But a proviso for reducing the rent in the event of the property tax being repealed is good. (*Colbron v. Travers*, 12 C.B., N. S. 181; 31 L. J., C. P. 257; but see *Beadel v. Pitt*, 13 W. R. 287.) And an agreement that if the tenant pay the rent in full without deducting income tax, the landlord will pay him the amount of the tax, is not illegal. (*Lamb v. Brewster*, 4 Q. B. D. 220; 48 L. J., Q. B. 421; 27 W. R. 395, 478.)

Tithe rent-charge.

Under the Tithe Act of 1836 the rent charge in lieu of tithes, which was charged directly upon the land and made recoverable by distress, but was not a personal charge upon either landlord or tenant, was a landlord's tax, and if paid by the tenant might be deducted from his rent. (See 6 & 7 Wm. IV., c. 71, ss. 67, 80, 81; *Griffenhoofe v. Daubuz*, 4 E. & B. 230; 5 *ib.* 746; 24 L. J., Q. B. 20; 25 L. J., Q. B. 237.) But it was competent for the landlord and tenant to enter into any contract they thought fit to vary this liability, and in practice the tenant's covenant to pay rates and taxes frequently included tithe rent-charge.

By the Tithe Act, 1891 (54 Vict. c. 8), however, tithe rent-charge, as defined by the 9th section, is to be payable by the owner of the lands out of which it issues, notwithstanding any contract between him and the occupier, and any contract made after 26th March, 1891 (the date of the passing of the Act), for payment of such tithe rent-charge by the occupier is void. (Sect. 1, sub-s. 1.) But where the occupier is liable for such payment under a contract made before the passing of the Act, although he ceases to be bound by that part of his contract, he is liable to pay to the owner such sum as the owner has properly paid on account of the tithe rent-charge which such occupier is liable under his contract to pay, exclusive of any costs incurred or paid by the owner in respect of such tithe rent-charge, and every receipt given for such sum shall state expressly

that the sum is paid in respect of that tithe rent-charge. If the lands out of which any tithe rent-charge issues are occupied by several occupiers who have contracted to pay it, any of such occupiers shall be liable only to pay such proportion of the sum paid by the owner of the lands as the rateable value of the lands occupied by him bears to the rateable value of the whole. (Sect. 1, sub-sect. 2.) Such sums are recoverable from the occupier by distress. (Sect. 1, sub-sect. 3.) The Act does not impose any personal liability upon either occupier or owner (sect. 2, sub-sect. 9); and, except in the cases before mentioned, the tithe rent-charge is only recoverable by an order of the County Court. If the lands are occupied by the owner, the order is executed by the appointment of an officer who, subject to the direction of the Court, is to have the same power of distress, and, failing distress, of possession as was conferred by the Tithe Acts upon the owner of a tithe rent-charge for its recovery. In every other case the order is executed by the appointment of a receiver. (Sect. 2.)

The remaining taxes which, in the absence of any agreement upon the subject, are to be borne by the landlord, and if paid by the tenant in the first instance are to be allowed out of his rent, are—land tax (38 Geo. 3 c. 5, ss. 17, 18, 35; *Ward v. Const*, 10 B. & C. 635); sewers rates assessed by the Commissioners of Sewers, not being for ordinary annual expenses, but for permanent improvements (*Callis on Sewers*, 140; *Palmer v. Earith*, 14 M. & W. 431; *Smith v. Humble*, 15 C. B. 330; *Soady v. Wilson*, 3 A. & E. 248;—as to sewers vested under the Public Health Act in the local authority, see 38 & 39 Vict. c. 55, s. 13); the poor rates, where hereditaments are let for a term not exceeding three months (32 & 33 Vict. c. 41, s. 1); and, under the Rating Act, 1874 (37 & 38 Vict. c. 54), the whole of the poor rates and other local rates in respect of land used as a plantation, or a wood, or for the growth of saleable underwood, and not subject to any right of common, or the right of sporting when severed from the occupation of the land, or one half in respect of mines other than coal mines. (And see p. 259.)

Other rates, such as house duties, poor rates, paving, watching, lighting, highway and county and borough rates, general district rates, and similar impositions, are charged upon the occupier, and are to be borne by him in the absence of any agreement to the contrary.

Land tax.

Sewers rate.

Poor rates,
&c., in cer-
tain cases.Tenants'
taxes.

Liability to
pay taxes
implied from
"net" rent,

"without
deduction."

Covenant to
pay

"all taxes;"

"parliamen-
tary taxes;"

"taxes on
the land;"

"taxes im-
posed on
the demised
premises."

The liability to pay and bear the landlord's taxes is very often by the lease shifted to the tenant. And this may be done by any terms in the lease implying that no deductions are to be made from the rent; thus a reservation of a "net" rent (*Bennett v. Womack*, 7 B. & C. 627; *Barrett v. Bedford*, 8 T. R. 602), or a rent "free of all outgoings" (*Parish v. Sleeman*, 1 De G., F. & J. 326; 29 L. J., Ch. 96), imposes upon a tenant the burden of all rates and taxes, except property tax. So does the reservation of a certain rent "without any deduction, defalcation, or abatement." (*Bradbury v. Wright*, 2 Doug. 624; *Sweet v. Seagar*, 2 C. B., N. S. 119; 5 W. R. 560.) But none of these forms of expression throw upon the tenant charges for the permanent improvement of the property. (*Home and Colonial Stores v. Todd*, 63 L. T. 829.)

In a covenant for the payment of taxes, it is sometimes a question of difficulty as to what burdens are included in the terms used. The enumeration of particular liabilities, followed by general words, as "other charges," will be limited to matters *ejusdem generis*. (*Bird v. Elces*, 37 L. J., Ex. 91; L. R., 3 Ex. 225.) A covenant to pay "all taxes" extends to all parliamentary taxes given to the crown, and therefore includes land tax (*Amfield v. White*, Ry. & Moo. 246; *Hopwood v. Barefoot*, 11 Mod. 237); so does a covenant to pay all "parliamentary taxes." (*Manning v. Lunn*, 2 C. & K. 13.) And "parliamentary taxes" includes a rent-charge in lieu of land tax (*Christ's Hospital v. Harrild*, 2 M. & G. 707), but does not extend to a liability to repair a bridge *ratione tenuræ*, although a local Act authorizes a rate for the repair of the bridge. (*Baker v. Greenhill*, 3 Q. B. 149; 11 L. J., Q. B. 161.) A covenant to pay "taxes" does not seem to extend beyond parliamentary taxes, so as to include parochial or sewers rates, or others of the like kind (*Arran v. Crisp*, 12 Mod. 55; *Brewster v. Kitchell*, 1 Salk. 198; 1 Ld. Raym. 317); and "all taxes, parochial and parliamentary," does not comprise a sewers rate, for it is neither parochial nor parliamentary. (*Palmer v. Earith*, 14 M. & W. 428.) A covenant to pay "taxes on the land" does not include poor and church rates, for these are personal charges. (*Theed v. Starkey*, 8 Mod. 314; *Rowls v. Gells*, Cowp. 452.)

A covenant by a lessee to pay all taxes, charges, rates, tithes, tithe rent-charge, dues, and duties whatsoever, then, or at any time *imposed upon the demised premises*, except

land and property tax, was held to include all rates and charges which were imposed upon the occupier in respect of his occupation, and therefore included church rate, highway rate, and poor rate. (*Hurst v. Hurst*, 4 Ex. 571; 19 L. J., Ex. 410.)

It has been decided that tithe rent-charge is not included in a covenant to pay "taxes and assessments" (*Jeffrey v. Neale*, L. R., 6 C. P. 240; 40 L. J., C. P. 191); but it is included under the word "charges" (*Lockwood v. Wilson*, 43 L. J., C. P. 179), and under "outgoings." (*Parish v. Sleeman*, 29 L. J., Ch. 96.)

What words include tithe rent-charge.

The word "rates" seems to include all the ordinary parochial and municipal rates; and "public taxes, charges, and assessments" include poor rates (*Rex v. Scot*, 3 T. R. 602); and "parochial taxes and assessments" seem to extend to a county rate. (*Reg. v. Aylesbury*, 9 Q. B. 261.)

"Rates."

Ordinarily "rates" include only compulsory impositions and not the liability for gas or water supplied to the premises, and although a covenant to pay "all rates chargeable in respect of the demised premises" was held to include the water rate (*Direct Spanish Telegraph Co. v. Shepherd*, 13 Q. B. D. 202; 53 L. J., Q. B. 420); in a later case, a covenant to pay "all rates, taxes, and impositions imposed by the corporation of the city of London or otherwise," was held not to include the water rate. (*Badcock v. Hunt*, 22 Q. B. D. 145; 58 L. J., Q. B. 134.)

Unless the covenant is extended to future out-goings, it includes all subsequently imposed taxes of the same nature as those in existence at the date of covenant, but not those of a different nature (*Brewster v. Kitchell*, 1 Salk. 198); but it may be extended to all future outgoings. (*Hurst v. Hurst*, 4 Ex. 571.)

Future impositions, how far included.

The old covenant as to payment of rates and taxes was directed to charges of annual recurrence. The modern covenant usually aims at securing to the landlord a net rent, and for this purpose attempts to throw upon the tenant not only annual charges, but also charges for permanent improvements. (*Sweet v. Seager*, 2 C. B., N. S. 119.) This may be done, provided the covenant is in terms sufficiently comprehensive to include the burden, and sufficiently exact to describe its incidence. For example, there are certain works done by local and sanitary authorities, the costs of which are a personal liability upon the landlord, and only become a charge upon the premises upon his default in payment. (*Allum v. Dickinson*, 9

Covenant extended to charges for permanent improvements,

Q. B. D. 632: 47 L. T. 493.) These costs are not rates or taxes, and are not included in words applicable only to charges of annual recurrence (*ib.*; *Lyon v. Greenhow*, 8 Times L. R. 457); but they come within the wider expressions hereinafter noticed. They are not correctly described as "charged upon the demised premises" (*Crosse v. Raw*, L. R., 9 Ex. 209; 43 L. J., Ex. 144); nor even, it would seem, as "payable in respect of the premises" (*Rawlins v. Briggs*, 3 C. P. D. 368; 47 L. J., C. P. 487); but are within the words "imposed upon the landlord in respect of the premises." (*Batchelor v. Bigger*, 60 L. T. 416.)

by the words
"Burdens,"

Perhaps the most inclusive word to describe these charges is "burdens." (*Sweet v. Seager*, 2 C. B., N. S. 119; and see *Tidswell v. Whitworth*, L. R., 2 C. P. 326; 36 L. J., C. P. 103.)

"Out-
goings,"

The next in order is "outgoings." A covenant to pay all "outgoings," to be charged or imposed upon the premises, or upon the landlord or tenant in respect thereof, includes the costs recoverable from the owner in a summary manner by a local board for works done under the Sanitary Act, 1866 (29 & 30 Vict. c. 90), s. 10 (*Crosse v. Raw*, 43 L. J., Ex. 144; L. R., 9 Ex. 209; though repealed, the section corresponds with s. 23 of Public Health Act, 1875, as to which see *Melhado v. Woodcock*, 9 Times, L. R. 48), and "outgoings of every description for the time being payable, either by the landlord or tenant, in respect of the said premises," includes the owner's proportion of the cost of paving a street under the Metropolis Management or Public Health Acts. (*Aldridge v. Ferne*, 17 Q. B. D. 212; 55 L. J., Q. B. 587; *Gardner v. Furness Rail. Co.*, 47 J. P. 232 (1883); *Batchelor v. Bigger*, 60 L. T. 416.) In each of these cases, the covenant expressly referred to outgoings imposed upon the landlord. In *Hill v. Edward* (W. N. (1885) p. 32; Cab. & E. 481), Mathew, J., held that the tenant was not liable to pay the owner's proportion of the cost of paving under a covenant to pay all "outgoings whatsoever then or thereafter to be charged or imposed on or in respect of the said premises, or any part thereof," but the case has been questioned. (*Aldridge v. Ferne*, *supra*.)

In *Midgley v. Coppock* (4 Ex. D. 309; 48 L. J., Ex. 674), a contract between vendor and purchaser to pay "all rates, taxes and outgoings," up to the time of completion, was held to include a charge under a local act in respect of improving the street in which the premises were situate.

(See also *Acton v. Crawley*, 54 L. J., Ch. 652; 28 Ch. D. 431; *Boor v. Hopkins*, 37 W. R. 349; 40 Ch. D. 572.)

The word "duty" in a covenant for payment of outgoings will include the expense occasioned by the performance of, or the sums payable to, a local authority on default of performance of a statutory duty imposed on the landlord. Accordingly a covenant to pay all taxes, rates, *duties* and assessments which should, during the continuance of the demise, be imposed on the tenant or landlord of the premises demised in respect thereof, was held to include the costs of paving a street, payable under the Metropolis Local Management Acts, 18 & 19 Vict. c. 120, s. 105; 25 & 26 Vict. c. 102, ss. 77, 96. (*Thompson v. Lapworth*, L. R., 3 C. P. 149; 37 L. J., C. P. 74.) And a covenant to bear, pay and discharge all taxes, rates, *duties* and assessments imposed upon the demised premises, or upon the landlords or tenants in respect thereof, was held to include the cost of complying with an order to abate a nuisance under the Public Health Act, 1875. (*Budd v. Marshall*, 5 C. P. D. 481; 50 L. J., C. P. 24.) In these cases, also, the word *duties* was supplemented by the words "imposed on the landlord." But where a local act authorized commissioners to pave footways, and the costs thereof were to be paid by the tenants or occupiers, who were to deduct the amount out of their rent, it was held the charge was within the terms of a covenant to pay all taxes, rates, *duties*, levies, assessments and payments whatsoever imposed upon or payable in respect of the premises. (*Payne v. Burridge*, 12 M. & W. 727; and see *Sweet v. Seager*, 2 C. B., N. S. 119.)

The word "charges" depends for its meaning upon the words with which it is collocated. *Primâ facie* it means payments of yearly recurrence, and not charges for permanent improvements. (*Allum v. Dickinson*, 9 Q. B. D. 632; 52 L. J., Q. B. 190.) Thus, a covenant to pay rates, taxes "and other charges payable in respect of the premises," was held not to include the cost of complying with an order for the removal of a nuisance, which was a personal order, and not a charge on the premises (*Bird v. Elwes*, L. R., 3 Ex. 225; 37 L. J., Ex. 91); and a covenant to pay all rates, charges and impositions charged or imposed "on the premises thereby demised, or in respect thereof, or of the said rent," was held not to throw upon the tenant the expense of drainage works ordered to be

done by the local authorities under the Public Health Act, 1875, since such expenses are by the Act imposed upon the landlord personally, and are not a charge upon the premises. (*Rawlins v. Briggs*, 3 C. P. D. 368; 47 L. J., C. P. 487. This case followed *Tidswell v. Whitworth*, L. R., 2 C. P. 326, but is distinguishable, as in the latter case the word "charges" did not occur in the covenant, and the disputed burden was in the nature of a penalty upon the landlord.) So the costs of paving a new street are, under the Metropolis Management Acts, a charge upon the owner, and are not within the terms of a covenant to pay charges "charged upon the premises, or payable by the occupier in respect thereof." (*Allum v. Dickinson*, *supra*.) But a covenant to pay all charges "charged or assessed upon the premises, or upon any person in respect thereof," will include every expense incurred in respect of the premises for which the landlord is personally liable. (*Hartley v. Hudson*, 4 C. P. D. 367; 48 L. J., C. P. 751.)

"Assessments and impositions."

The words "assessments and impositions," like the word charges, refer to yearly payments, unless associated with words which give them a more extended meaning. (*Tidswell v. Whitworth*, L. R., 2 C. P. 326; 36 L. J., C. P. 103; *Wilkinson v. Collyer*, 13 Q. B. D. 1; 53 L. J., Q. B. 278; 51 L. T. 299; *Allum v. Dickinson*, 9 Q. B. D. 632; 52 L. J., Q. B. 190.) They would not include payments in the nature of penalties for the default of the landlord (*Tidswell v. Whitworth*, *supra*), costs of paving (*Wilkinson v. Collyer*, *supra*), or the landlord's moiety of the costs of rebuilding a party wall. (*Southall v. Leadbetter*, 3 T. R. 458.) But where a tenant covenanted to pay a reasonable share towards the repair of party walls and to pay all taxes, rates, duties, assessments, and impositions imposed or charged upon the premises or upon the landlord in respect thereof, it being the intention of the parties that the landlord should receive the clear yearly rent of 60*l.* in net money without any deduction whatsoever, it was held that the tenant was bound to pay the moiety of the expenses of rebuilding a party wall. (*Barrett v. Bedford*, 8 T. R. 602.)

Form of covenant to include all present and future impositions.

In the present state of the authorities, it would appear that a covenant "to pay and bear all present and future rates, taxes, outgoings, duties, and burdens whatsoever imposed on the demised premises or on the owner or occupier in respect thereof (except landlord's property tax and tithe rent charge)," will cover all outgoings.

Prior to the passing of the Rating Act, 1874, all mines, except coal mines, all woodlands not used for the growth of saleable underwoods, and the right of sporting as distinct from the occupation of the land were exempt from taxation. That Act (37 & 38 Vict. c. 54) abolished the exemption (sect. 3) and enabled the tenant, in the case of plantations, to deduct the whole of the increased rate paid in respect thereof from his rent (sect. 5.), and so in the case of rights of sporting severed from the occupation, "unless he has specifically contracted to pay such rate in the event of an increase." (Sect. 6.)

Contracts to exempt the landlord under the Rating Act, 1874,

Section 8 provides that "where any poor or other local rate, which, at the commencement of this Act, any lessee, licensee, or grantee of a mine is exempt from being rated to in respect of such mine, becomes payable by him in respect of such mine during the continuance of his lease, grant, or licence, or before the arrival of the period at which the amount of the rent, royalty, or dues is liable to revision or readjustment, he may (unless he has specifically contracted to pay such rate in the event of the abolition of the said exemption) deduct from any rent, royalty, or dues, payable by him, one-half of any such rate paid by him." Upon the construction of this section it has been held that the specific contract to throw the whole burden of the rate upon the tenant must be one expressly referring to future legislation, and will not be affected by the terms of a lease by which rent is to be paid "free from all rates, taxes, expenses, and deductions, parliamentary, parochial, or of any other nature." (*Duke of Devonshire v. Barrow Hæmatite Steel Co.*, 46 L. J., Q. B. 435; 2 Q. B. D. 286; *Chaloner v. Bolckow*, 3 App. Cas. 933; 47 L. J., C. P. 562.)

in the case of mines.

Under a covenant by a landlord to pay rates and taxes, he is liable only in respect of the actual rent reserved; so that where the landlord covenanted to pay land tax and save the tenant harmless, he was held to have satisfied his covenant by paying the tax at the rate of 120%, the rent he actually received, though the premises were taxed at 150%. (*Yau v. Leman*, 1 Wils. 21; *Whitfield v. Brandwood*, 2 Stark. 440); and if the tenant be underrated he can only deduct *pro rata*. (*Sherington v. Andrews*, Comb. 483.) And where a tenant was to deduct sewers rate and land tax, and he built on the land so as to increase the rateable value, it was held that he was only entitled to deduct the rate and tax on the original rent. (*Smith v. Humble*, 15

Landlord's liability to pay land tax limited by the rent reserved.

His liability to pay other taxes not extended to increased value.

C. B. 321; *Hyde v. Hill*, 3 T. R. 377.) And where the landlord covenanted to pay all taxes "already charged or to be charged upon or in respect of the demised premises," there being a covenant by the tenant not to build without licence, and the tenant at the time of the lease received such licence, and afterwards built so as to increase the annual value of the premises, it was held that the landlord was only liable to pay the taxes on the original value. (*Watson v. Home*, 7 B. & C. 285; *Graham v. Wade*, 16 East, 29.) Indeed a covenant by the landlord as to payment of rates and taxes, whether present or future, must generally be taken to apply to those which are or would be payable in respect of the premises in the state in which they are at the time of demise. (*Watson v. Atkins*, 3 B. & Ald. 647.)

Tenant's remedies for recovery of taxes.

Where a tenant has actually paid (*Ryan v. Thompson*, L. R., 3 C. P. 144; 37 L. J., C. P. 134) a tax which his landlord is bound to pay, he may deduct the amount from his next rent (*infra*, p. 273); or, before payment of the next rent, but not afterwards—unless there has been a special agreement on the matter (*Lamb v. Brewster*, 4 Q. B. D. 220; 48 L. J., Q. B. 421)—he may bring an action against his landlord and recover the amount. (*Graham v. Tate*, 1 M. & S. 609; *Cumming v. Bedborough*, 15 M. & W. 438.)

Landlord's remedy.

The landlord's remedy for breach of an agreement to pay any outgoings would be by action on the covenant or agreement (*Thompson v. Lapicorth*, L. R., 3 C. P. 149; 37 L. J., C. P. 74), or by re-entry, if there is a proviso to that effect. The covenant is broken as soon as the outgoing becomes due, and is unpaid, though it may not have been demanded. (*Davis v. Burrell*, 10 C. B. 821.)

Rates allowed or paid by landlord in mistake.

Where a landlord's receiver allowed the tenant every year for seventeen years to make a deduction in respect of land tax greater than the landlord was liable to pay, and the landlord had the means of knowing all the facts, it was held that he could not afterwards distrain for the amount erroneously allowed. (*Bramston v. Robins*, 4 Bing. 11.) Neither could he recover in an action on the covenant or agreement to pay the rates. (*Waller v. Andrews*, 3 M. & W. 312.) But such an allowance by the landlord, when made under a *bonâ fide* forgetfulness of facts which disentitled the tenant to the allowance, might entitle the landlord to recover it back as money paid under a mistake of fact. (*Kelly v. Solari*, 9 M. & W. 54; *Gingell v. Purkins*, 4 Ex. 720; 19 L. J., Ex. 129.)

SECT. 17.—*Rent.*

The obligation to pay rent or compensation for the use of the demised premises may arise either by implication or by express stipulation. The payment of rent, though usual, is not essential (1 Platt, 9), and it is perfectly consistent with the relationship of landlord and tenant that the tenant should hold rent free. (*Corrigan v. Woods*, 15 W. R. 318; Ir. R., 1 C. L. 73.) Obligation to pay rent.

If there is merely a demise at a given rent without any promise to pay, the remedy is upon the implied contract. Implied.

The words “yielding and paying” in a lease by deed create an implied covenant to pay the rent; but any words indicative of the intention of the parties that a specified rent shall be paid, amount to an implied agreement on the part of the tenant to pay it. Thus, an agreement to let “at and under the clear yearly rent of 80*l.*” without more, imports an agreement on the tenant’s part to pay such rent. (*Doe v. Kneller*, 4 C. & P. 3.) So, in a demise, do the words “provided the lessee shall pay.” (*Harrington v. Wise*, Cro. Eliz. 486.)

If with or without a formal reservation there is a covenant or promise to pay a certain rent, the remedy is upon the covenant or promise. Instruments of demise usually contain an express covenant as to the rent, and specify the times of payment, generally by half-yearly or quarterly payments. Express.

A covenant for the payment of rent, whether express or implied, runs with the land.

The tenant’s liability under an implied covenant determines upon his assigning the property to another, but under an express covenant he remains liable during the whole term. (*Staines v. Morris*, 1 V. & B. 11.)

Where by the stipulation of the parties there is a condition precedent to the recovery of the rent, it must be performed before the rent is payable. (*Brook v. Fletcher*, 37 L. T. 100.) Thus, where a furnished house was hired at a yearly rent for the house and furniture, under an agreement that it should be completely furnished without specifying any time, and the tenant was let into possession when it was furnished only in part, it was held that the reservation of rent was conditional and did not become payable until the furnishing was complete. (*Mechelen v. Wallace*, 7 A. & E. 54, n.) Conditions precedent.

Payments
which are
not rent.

We have previously defined rent. (*Ante*, p. 96, and see notes to *Clun's case*, Tud. L. C. R. Pro. 284.) There are many payments agreed to be made under the name of rent which are not strictly rent. These are recoverable by action on the agreement (*Adams v. Hagger*, 4 Q. B. D. 480; 41 L. T. 224) but not by distress, unless an express power to distrain therefor is given. Such are reservations by way of rent on a lease of incorporeal hereditaments (Co. Litt. 47 a), or of personal chattels. But where land and chattels are demised (as in the case of a furnished house or lodgings) at one entire yearly payment, this is rent and issues out of the land alone. (*Spencer's case*, 5 Rep. 17 b; *Newman v. Anderton*, 3 B. & P. N. R. 224.) Payment for a mere licence to use premises (*ante*, p. 69) is not rent; but a sum reserved for the exclusive use of a room in a mill and the supply of driving power, is rent. (*Marshall v. Schofield*, 31 W. R. 134; 52 L. J., Q. B. 58; *Selby v. Greaves*, L. R., 3 C. P. 594; 37 L. J., C. P. 251.) Payment by way of increased rent or percentage on the outlay for improvements to be made by the landlord on the premises (*Hoby v. Roebuck*, 7 Taunt. 157; *Donellan v. Read*, 3 B. & Ad. 899; *Lambert v. Norris*, 2 M. & W. 333), and payments "over and above the rent" (*Smith v. Mapleback*, 1 T. R. 441) are not rent. When a lessee for years assigns over the whole of his term, reserving periodical payments called rent, these reservations, though not, properly speaking, rent (2 Platt, 83), are in the nature of rent (and *not* of sums in gross), and are recoverable by action, but not by distress for want of a reversion. (*Baker v. Gostling*, 1 Bing. N. C. 19; *Williams v. Hayward*, 28 L. J., Q. B. 374; 1 E. & E. 1040.)

Royalties.

Royalties reserved on the working of a quarry, coal, or other mine or a brickfield are rent (*Reg. v. Westbrook*, 10 Q. B. 178; 16 L. J., M. C. 87; *Edmonds v. Eastwood*, 27 L. J., Ex. 209; *Barrs v. Lea*, 33 L. J., Ch. 437), notwithstanding a mineral lease is in reality a sale out-and-out of so much of the land. (*Gowan v. Christie*, L. R., 2 Sc. App. 273, *per* Lord Cairns; *Leppington v. Freeman*, 40 W. R. 348.)

On what day
payable.

If rent be reserved generally, *e. g.*, "at a rent of 10*l.*," without saying annually, it will nevertheless become payable yearly (2 Roll. Abr. 449; 3 Cruise, Dig. Title 28, c. 1, s. 49), and if no time be mentioned for payment, it is only payable at the end of each year. (*Cole v. Sury*, Latch.

264; *Collett v. Curling*, 10 Q. B. 785; 16 L. J., Q. B. 390.) But it may be shown by the contemporaneous or subsequent dealings of the parties, that it was their intention it should be payable earlier (*Gore v. Lloyd*, 12 M. & W. 463), though a stipulation for determining the tenancy by a six months' notice to quit, expiring on any quarter day, will not raise a presumption that the rent is to be payable quarterly. (*Collett v. Curling, supra.*) And where a house was let at a yearly rental of 50*l.*, and the instrument, after containing certain clauses as to the house, ended, "likewise the stable and loft now occupied by H. at a further rental of 25*l.* per annum, to be paid on the usual quarter days," it was held that the quarterly payment applied only to the latter rent. (*Coomber v. Howard*, 1 C. B. 440.) Where the reservation was general in a written agreement of demise, but the landlord afterwards asked the tenant how he would like to pay, and he replied quarterly, it was held that the rent was still due annually and not quarterly, although rent had been actually paid quarterly. (*Turner v. Allday*, Tyr. & Gr. 819.) If the rent be made payable yearly, without saying "during the said term," yet the payment must be made every year during the term. (*Harrington v. Wise*, Cro. Eliz. 486.) If payable on "the two most usual feast days," Lady-day and Michaelmas will be understood, and the rent will be payable in equal portions. (2 Roll. Abr. 450.) If the rent be made payable half-yearly or quarterly, and no specific days are mentioned, the payment will be in equal portions on the half-yearly or quarterly days, computed from the date of the lease or the date of the habendum, but where special days are limited by the reddendum the payments are regulated by it. (*Tomkins v. Pinsent*, 2 Ld. Raym. 819.) If payable quarterly or half-yearly on certain specified days, the first payment will become due on the first of those days happening after the execution of the lease, though it may not be the first in the order of the arrangement of the words. (*Hill v. Graunge*, Plowd. 171; Co. Litt. 217 b; 2 Platt on Leases, 114.) But where by an agreement dated the 8th of September, 1835, a house was let for seven years at an annual rent payable quarterly, the first payment to be made on the 25th of March following, it was held that only a quarter's rent became due on the 25th of March, so that the last quarter's rent would not become due until a quarter after the term had expired.

(*Hutchins v. Scott*, 2 M. & W. 809, 810.) Where the reservation was "quarterly, or half-yearly if desired," it was held that the landlord having received the rent quarterly for the first twelve months, a previous notice of his intention to change was necessary to make it payable half-quarterly. (*Mallam v. Arden*, 10 Bing. 299.)

Days of
grace.

If the rent is reserved payable on specified days or within so many days after, it is not absolutely due until the expiration of the last day of grace, nor can the landlord distrain or bring an action for it before. (*Clun's case*, 10 Co. 127 a; *Glover v. Archer*, 4 Leon. 247; 2 Platt, 116.) In such a case, however, if the lease end on one of the days of payment, the last payment becomes due on the last day of the term. (*Barwick v. Foster*, Cro. Jac. 233; *Biggin v. Bridge*, 3 Keb. 534.)

A mere indulgence which has formed the customary mode of dealing between the parties, and by which the payment of the rent has been allowed to be deferred for a certain period after the date when reserved payable, will not prevent the landlord recovering it by action or distress before the period has expired.

Forehand
rent.

Rent may be reserved payable in advance, and so recovered by action on the covenant or agreement, or by distress (*Lee v. Smith*, 9 Ex. 662; 23 L. J., Ex. 198; *Yeoman v. Ellison*, 36 L. J., C. P. 326; L. R., 2 C. P. 681; *Buckley v. Taylor*, 2 T. R. 600; *Ex parte Hale*, 1 Ch. D. 285; 45 L. J., Bkcy. 21; *Charters v. Sherrock*, Alc. & Nap. 17, 506; *Harrison v. Barry*, 7 Price, 690); but not in an action for use and occupation. (*Angell v. Randall*, 16 L. T., N. S. 498.)

By the custom of the country rent may be due in advance. (*Buckley v. Taylor*, 2 T. R. 600.) But where there was an agreement for the payment of rent quarterly, it was held that the first payment became due at the end of the first quarter, and that the custom to pay rent in advance could not be imported into the agreement. (*Doe v. Weller*, 1 Jur. 622.)

It seems doubtful whether a reservation of rent in advance during the whole term would be warranted in a lease under a power to let for the best yearly rent that can reasonably be obtained. (*Rutland v. Wythe*, 10 Cl. & F. 419, 469; 12 M. & W. 355, 399.) A proviso that the first five years' rent should be paid in advance was held not to be warranted by such a power (*Booth v. A'Beckett*,

9 L. T., N. S. 68); but the reservation of the last half year's rent in advance is free from objection. (*Rutland v. Wythe, supra.*) And in every case it is a question of fact whether or not the best rent is reserved.

Where a lease reserving a forehand rent determines, and the tenant continues to hold on without any express stipulation to the contrary, the rent continues payable in advance. (*Finch v. Miller*, 5 C. B. 428.) But there must be a clear intention that it is to be payable in advance during the whole of the tenancy, for where there was a reservation of rent, "to commence at Michaelmas, and to be paid three months in advance," it was regarded as limited to the first quarter. (*Holland v. Palser*, 2 Stark. 161; and see *Hopkins v. Helmore*, 8 A. & E. 463; *Clarke v. Holford*, 2 C. & K. 540.) It is very usual, especially in farming leases, to reserve the last half-year's rent payable in advance; and where it was provided that the tenant should pay the last half-year's rent in advance, "which last-mentioned half-year's rent should be considered as reserved and due on the said 29th day of September preceding, if the landlord should see cause for such a demand," it was held that the rent became due on the 29th of September, and that the landlord was entitled to make such a demand and distrain, although the day was past. (*Witty v. Williams*, 12 W. R. 755; *Williams v. Holmes*, 22 L. J., Ex. 283.) When rent is payable in advance "if required," reasonable notice should be given before enforcing it. (*London and Westminster Loan Co. v. Lond. & N. W. Rail. Co.*, 37 Sol. J. 497.)

Payment before the time when the rent becomes due, though good as against the landlord himself (*Nash v. Gray*, 2 F. & F. 391), does not discharge the tenant as against any person who, before the rent is due, acquires the landlord's estate, unless the tenant has no notice before the proper date of payment that the landlord has parted with his estate. (4 Anne, c. 16, ss. 9, 10.) Therefore where a lessor let his land at a rent payable quarterly, and afterwards mortgaged it, but remained in possession and obtained from the lessee who had notice of the mortgage a year's rent in advance, it was held that the payment of rent in advance was not a good payment as against the mortgagee, who, before the rent became due, gave the lessee notice to pay the rent to him (*De Nicholls v. Saunders*, L. R., 5 C. P. 589; 39 L. J., C. P. 297; and see *Municipal Permanent, &c. Building Society v. Smith*, 22

Rent paid before due not a discharge.

Q. B. D. 70) ; and the same rule applies where the lessor grants away the reversion. (*Cook v. Guerra*, L. R., 7 C. P. 132 ; 41 L. J., C. P. 89.)

Time of day
when due.

Rent is *due* at the first moment of the morning of the day appointed for payment, but is not *in arrear* until the first moment of the next day. (*Dibble v. Bowater*, 2 E. & B. 564 ; 22 L. J., Q. B. 396.) The older cases decided that rent was not due until midnight of the day of reservation (*Cutting v. Derby*, 2 W. Bl. 1077 ; *Norris v. Harrison*, 2 Madd. 268), but the distinction was chiefly important as to questions of the right to rent as between the heir and personal representatives of the landlord, which have been obviated by 33 & 34 Vict. c. 35 (*post*, p. 275). In order to entitle the lessor to re-enter and avoid the estate for forfeiture for breach of the condition for payment of rent, it must be demanded a sufficient time before sunset to allow of the money being counted ; and if payment is not made on demand, the person must remain until the sun has set, that there may be a constructive continuing demand up to that time. (*Ex parte Smyth*, 1 Swanst. 343, note ; *Duppa v. Mayo*, 1 Wms. Saund. 287 (m).) So that a demand at half-past ten in the morning of the last day (*Acocks v. Phillips*, 5 H. & N. 183), or at one o'clock (*Doe v. Paul*, 3 C. & P. 613), is not good. Modern leases generally contain an express stipulation dispensing with a formal demand. (*Doe v. Masters*, 2 B. & C. 490.)

To be de-
manded.

Where rent
is payable.

Except where the crown is the lessor, rent, unless otherwise provided, is payable upon the land, and no forfeiture is worked unless so demanded. (*Burroughes' case*, 4 Co. 72, a.) But if there be a covenant to pay rent, and the landlord sues upon it, it is no defence that the rent was not demanded upon the land ; for a covenant for payment of rent at a time and in manner reserved, when no particular place is mentioned, is analogous to a covenant to pay a certain sum of money in gross on a day certain, in which case it is incumbent on the covenantor to seek out the person to be paid, and tender the money. (*Haldane v. Johnson*, 22 L. J., Ex. 264 ; 8 Ex. 689.)

How payable.

Rent may be paid in the same manner as any other debt. Thus, payment in silver, gold, or Bank of England notes would be unexceptionable, and the landlord might refuse to be paid in any other way. But he may waive this right. and then the payment may be in anything which the parties treat as money. Country bank notes or the

Notes or
cheques.

tenant's cheque, unless objected to by the landlord, will amount to a conditional payment. (*Ward v. Evans*, 2 Ld. Raym. 928; *Pearce v. Davis*, 1 M. & Rob. 365.) If, however, the country bank fail, or the cheque be dishonoured, the landlord's remedies remain entire. (*Everett v. Collins*, 2 Camp. 515; *Cohen v. Hale*, 47 L. J., Q. B. 496; 3 Q. B. D. 371; Byles on Bills, 25, 14th ed.) But in the case of a note, or a cheque not on the drawer's own account, it must be presented for payment within a reasonable time; for otherwise, if the bank or person who ought to pay it becomes insolvent, the landlord must bear the loss, because he prevented the tenant from receiving the money by detaining the note in his custody. (*Ward v. Evans*, *supra*; *Camidge v. Allenby*, 6 B. & C. 373; *Lichfield Union v. Greene*, 26 L. J., Ex. 140; *Hopkins v. Ware*, L. R., 4 Ex. 268; 38 L. J., Ex. 147.) Where the plaintiff and defendant each kept an account with one banker, and in October the plaintiff authorized the defendant to pay into his account a sum due for rent, the defendant wrote saying it was done, and the plaintiff sent him a receipt; the sum, owing to a mistake, was not transferred until the 9th of December, when a notice was sent to plaintiff of the transfer, but it did not reach him until the 11th, and in the meanwhile, on the 10th, the bankers failed; it was held that this was a sufficient payment. (*Eyles v. Ellis*, 4 Bing. 112.) A remittance by post, if authorized by the landlord or previously sanctioned by him, would be a sufficient payment (*Warwicke v. Noakes*, Peake, 98); and where there was a request so to remit, it would be remitted at the peril of the landlord, if the tenant had used due caution in delivering it at the post office. (*Hackins v. Rutt*, Peake, 248.) A landlord by taking a security does not merge his original claim in respect of rent; and therefore a bond, bill of exchange, or promissory note, taken for rent (*Harris v. Shipway*, Bull. N. P. 178; *Davis v. Gyde*, 2 A. & E. 623; *Palfrey v. Baker*, 3 Price, 572), whether the rent be reserved by deed or by parol (*Willett v. Earle*, 1 Vern. 490; *Gage v. Acton*, 1 Salk. 325), will not, until actual payment under the bond, bill, or note, unless there be a distinct agreement to that effect, operate as a satisfaction of the rent, or even suspend the landlord's right to distrain, or his other remedies for the recovery of the rent.

Remittance
by post.

Rent not
merged by
security.

Payment or tender of rent should be to the landlord himself or his duly authorized agent (*Goodland v. Blewith*, To whom payable. [And see

*Chap. VI.,
who may
distrain.]*

1 Camp. 477); that is (1) a person the tenant has been expressly directed to pay (*Roper v. Bumford*, 3 Taunt. 76); (2) one whom the tenant has previously paid with the approval of the landlord; or (3) one who would be entitled to give receipts for the same in the ordinary course of his duties, as the steward or estate agent of the landlord. If made to the landlord's wife, her agency must be established like any other agency, *e.g.* by like payments previously sanctioned. (*Browne v. Powell*, 4 Bing. 230; *Offley v. Clay*, 2 M. & Gr. 172.) Payment to an agent whose authority has been revoked (*Venning v. Bray*, 31 L. J., Q. B. 181; 2 B. & S. 502), or to a person not entitled to receive it, with the acquiescence (under a false impression) of the person really entitled (*Williams v. Bartholomew*, 1 B. & P. 326), is not good. Rent paid to the wrong person under a mistake of fact may be recovered back. (*Barber v. Brown*, 26 L. J., C. P. 41; 1 C. B., N. S. 121; *Newsome v. Graham*, 10 B. & C. 234.)

In the case of
joint tenants.

Where the lessors are joint tenants, payment to either one is sufficient (*Robinson v. Hofman*, 4 Bing. 562, *per* Burrough, J.); so, in the case of tenants in common, for though their interests are separate, the one would be regarded as the agent of the other. (But see *Thompson v. Hakewell*, 35 L. J., C. P. 18.) The tenant may not, however, continue to pay the whole rent to one tenant in common after notice from the other not to do so. (*Harrison v. Barnby*, 5 T. R. 246; *Powis v. Smith*, 5 B. & Ald. 850.)

Where lease
by a mort-
gagor.

If a lessor after granting a lease mortgage the reversion, the tenant may continue to pay rent to him until notice from the mortgagee to the contrary (*Trent v. Hunt*, 22 L. J., Ex. 318; 9 Ex. 14; 4 Anne, c. 16, s. 10); so if the lease be granted after the mortgage, but by the mortgagor alone. (*Pope v. Biggs*, 9 B. & C. 251, *per* Bayley, J.) Formerly a mortgagor having parted with his reversion could not recover in ejectment or in an action for rent against a tenant whose tenancy existed at the date of the mortgage. (2 Dav. Conv. 650, 3rd ed.) But by sect. 25, sub-s. 5, of the Judicature Act, 1873 (36 & 37 Vict. c. 66), it is provided that a mortgagor for the time being entitled to the possession or receipt of the rents and profits of any land as to which no notice of intention to enter into possession or receipt of rents and profits thereof shall have been given by the mortgagee, may sue for possession or for re-

covery of such rents or profits in his own name. (*Heath v. Pugh*, 6 Q. B. D. 345; 13 App. Cas. 235; 50 L. J., Q. B. 477.) After notice from the mortgagee to pay the rents to him, he is entitled to sue or distrain for all unpaid arrears and future rents in the case of leases made prior to the mortgage (*Moss v. Gallimore*, 1 Sm. L. C. 604, 9th ed.; *De Nicholls v. Saunders*, L. R., 5 C. P. 589; 39 L. J., C. P. 297), or since the mortgage and in pursuance either of a power in the mortgage deed (*Rogers v. Humphreys*, 4 A. & E. 299), or of the statutory power conferred by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 18. (*Ante*, p. 54; and see *Municipal Permanent, &c. Building Society v. Smith*, 22 Q. B. D. 70; 58 L. J., Q. B. 61.) In the case of tenancies created since the mortgage, but not in pursuance of such powers as last mentioned, a notice by the mortgagee to the lessee to pay rent to him does not make the lessee his tenant or create any privity of estate between them so as to enable the mortgagee to sue or distrain for rent. (*Evans v. Elliott*, 9 A. & E. 342.) If acquiesced in and assented to by the tenant (*Towerson v. Jackson*, [1891] 2 Q. B. 484; 61 L. J., Q. B. 36, explaining *Brown v. Storey*, 1 M. & Gr. 117; *Underhay v. Read*, 20 Q. B. D. 209; 57 L. J., Q. B. 129), a new tenancy from year to year is created between the lessee and the mortgagee, at the old rent (*Corbett v. Plowden*, 25 Ch. D. 678; 54 L. J., Ch. 109); and payment to the mortgagee discharges the tenant in respect of rent becoming due after such assent. (*Underhay v. Read*, *supra*.) But the mere fact of the tenant remaining in possession after receiving such a notice is no evidence of assent. (*Towerson v. Jackson*, *supra*.) Instead of acquiescing in the notice the tenant can decline to pay, give up possession, and recover damages against the mortgagor for breach of covenant for quiet enjoyment. (*Carpenter v. Parker*, 3 C. B., N. S. 206; 27 L. J., C. P. 78.) If he neglect to give up possession the mortgagee can eject him, but cannot recover arrears of rent as mesne profits. (*Turner v. Cameron's Coalbrook Steam Coal Co.*, 5 Ex. 932; 20 L. J., Ex. 71; *Litchfield v. Ready*, 5 Ex. 939; 20 L. J., Ex. 51.) In the case of land, the right of ejectment is subject to the provisions of the Tenants' Compensation Act, 1890 (53 & 54 Vict. c. 57, *infra*, Chap. IX., s. 4.)

A parol agreement for the reduction of rent, for which there is no consideration, is a mere indulgence which the landlord may at any time put an end to and insist on the

Amount recoverable after agree-

ment to
reduce.

original rent. (*Crowley v. Vitty*, 7 Ex. 319; 21 L. J., Ex. 135.) Nor will the Courts grant specific performance of a written promise by the landlord to reduce the rent reserved by a lease under seal in consideration of previous expenditure on the premises by the tenant and a fall in the value of the lands, notwithstanding acceptance of the reduced rent for seven years. (*Fitzgerald v. Lord Portarlington* [1835], 1 Jones (Ir. Ex.) 431.) But an agreement for the reduction of rent consequent on a threat by the tenant to leave may amount to a surrender of the old and the creation of a new tenancy at the reduced rent. (*Parker v. Briggs*, 37 Sol. J. 452.)

Rent ascer-
tained or
ascertainable.

Minimum
rents notwith-
standing no
beneficial
working.

The rent may be a sum ascertained and certain in amount, or it may be fluctuating in amount, but ascertainable by some rule of calculation contained in the lease—the latter kind of rent is usual in mining leases, in which a fixed minimum or dead rent is reserved, with a further rent or royalty upon the quantity of minerals sold or gotten. If the minerals demised are not worth the working, or the lessee is prevented from working by accidents, faults, or defects, he must still pay the minimum rent (*Bute v. Thompson*, 13 M. & W. 487; *Rex v. Bedworth*, 8 East, 387; *Jefferys v. Fairs*, 4 Ch. D. 448; 46 L. J., Ch. 113, *ante*, p. 220); nor will the Courts, on equitable grounds, relieve from the payment of such minimum rents. (*Phillips v. Jones*, 9 Sim. 519; *Ridgway v. Sneyd*, Kay, 627.) But where the thing let is a nonentity, the lessee is not bound to pay rent. (*Gowan v. Christie*, L. R., 2 Sc. & Div. 273.) A covenant to pay a proportion of all such sums of money as the coals gotten should sell for at the pit's mouth, was held not to make the lessee liable to pay any such proportion in respect of coals sold elsewhere than at the pit's mouth. (*Clifton v. Walmesley*, 5 T. R. 564.)

Rent to be
fixed in
future.

If a person enter at a rent to be fixed in future, no distress can be made, but an action may be brought for the rent on a *quantum valebat* (*Hamerton v. Stead*, 3 B. & C. 478); but a single payment makes it certain, so that it can thenceforth be distrained for.

Penal rents,

A gross sum in the nature of a penalty agreed to be paid for breach of *any* covenant in a lease, cannot be recovered as rent; but where additional rents are reserved for the non-observance of *particular* covenants or stipulations, to be calculated according to the extent of such non-observance—*e. g.*, a rent of 5*l.* per acre for land ploughed or cultivated contrary to the terms of the lease—

such rents are regarded not as penalties, but as liquidated damages, and are to be paid exactly as reserved (*Farrant v. Olmius*, 3 B. & Ald. 692; *Re Earl of Mexborough and Wood*, 47 L. T. 516; *Jones v. Green*, 3 Y. & J. 298), and the mere use of the word "penalty" in reference to the increased payment will not make it such, if the Court is satisfied upon the language of the whole instrument that liquidated damages were intended (*Elphinstone v. Monkland Iron Co.*, 13 App. Cas. 332; 35 W. R. 17; and see as to distinction between penalties and liquidated damages, *Magee v. Lavell*, 43 L. J., C. P. 131; L. R., 9 C. P. 107; *Re Newman, Ex parte Capper*, 4 Ch. D. 724; 46 L. J., Bkcy. 57; *Wallis v. Smith*, 21 Ch. D. 243; 52 L. J., Ch. 145; Chit. Cont. 842 *et seq.* 12th ed.; *Peachy v. Somerset*, 2 Wh. & T. L. C. 1123), and, if so provided in the lease may be recovered by distress. (*Rolfe v. Peterson*, 2 Bro. P. C. 436; *Pollitt v. Forrest*, 11 Q. B. 949; 16 L. J., Q. B. 424; *Bowers v. Nixon*, 18 L. J., Q. B. 35.) And if the agreement is in effect that an increased rent shall be paid, it will be recoverable by distress as of common right without an express provision. (*Roulston v. Clarke*, 2 H. Bl. 563; *Pollitt v. Forrest*, *supra*.) The courts will not on equitable grounds relieve against such a covenant. (*Rolfe v. Peterson*, *supra*.) The common instances of reservations of additional rents are for ploughing up ancient meadow or pasture land (*Rolfe v. Peterson*, *supra*; *Woodward v. Gyles*, 2 Vern. 119), for converting into tillage, land used as meadow or pasture land at the time of the demise (*Bowers v. Nixon*, 12 Q. B. 558), for converting particular lands into tillage (*Farrant v. Olmius*, *supra*), for ploughing or converting into tillage more than a certain proportion of the demised lands, either during any part of the term (*Denton v. Richmond*, 1 Cr. & M. 734), or during a certain number of the last years thereof (*Roulston v. Clarke*, 2 H. Bl. 563; *Birch v. Stephenson*, 3 Taunt. 469), for sowing more than a given number of acres in one year with a particular crop (*Jones v. Green*, 3 Y. & J. 298), for mowing without first manuring (*Bowers v. Nixon*, *supra*), and for removing hay and other produce grown upon the land. (*Pollitt v. Forrest*, *supra*; *Legh v. Lillie*, 6 H. & N. 165; *Fielden v. Tattersall*, 7 L. T., N. S. 718.) Where the reservation was of an additional rent during the last twenty years of a term, for every acre of meadow which should be ploughed, broken up, or converted into tillage during the said last twenty years of the term, it was held

in respect of
what acts
payable.

that the rent was due in the last twenty years if the land was then ploughed, whether it was first ploughed in the last twenty years or before, and that the rent continued payable during the twenty years, though the land was again laid down in permanent grass. (*Birch v. Stephenson*, 3 Taunt. 469.) But lands, ploughed shortly before the commencement of a term, are not rendered pasture so as to prevent the tenant breaking them up, by his having for thirty years of the term allowed them to continue as pasture. (*Goring v. Goring*, 3 Swanst. 661.) A landlord does not waive his right to additional rent by having knowledge of the breach and subsequently accepting the original rent, for liquidated damages cannot be waived. (*Denton v. Richmond*, 1 Cr. & M. 734.)

Where a lease reserves an additional rent in case of breaches of covenant, and also gives a power of re-entry for such breaches, the landlord has the option either to re-enter or accept the increased rent. (*Weston v. Managers of Metropolitan Asylum District*, 9 Q. B. D. 404; 51 L. J., Q. B. 399.) But where there is an absolute covenant by the tenant to do a certain thing, and a proviso for reduction of rent so long as he shall continue to observe his covenant, he has not the option of breaking his covenant provided he pay the unreduced rent. (*Hanbury v. Cundy*, 58 L. T. 155.)

Deductions
for payments
to preserve
tenant's
possession.

Where the tenant has paid, on behalf of the landlord, sums which it was the landlord's duty to pay, and which were charged upon the land, so that the failure to pay them would prevent the tenant's peaceable possession of the property, the tenant is considered as authorized by the landlord to make such payments, and treat the same as having been made in satisfaction or part satisfaction of his rent. (*Graham v. Allsopp*, 3 Ex. 186; 18 L. J., Ex. 85; *Jones v. Morris*, 18 L. J., Ex. 477.) Of this description are payments of rent made by the tenant to the superior landlord of his own lessor, to prevent his own goods being taken in distress (*Sapsford v. Fletcher*, 4 T. R. 511; *Wheeler v. Branscombe*, 5 Q. B. 373; *O'Donoghue v. Coalbrook Co.*, 26 L. T., N. S. 806), notwithstanding the superior landlord may not have threatened to distrain, but only demanded the rent, or may have allowed the occupying tenant time to pay. (*Carter v. Carter*, 5 Bing. 406; *Valpy v. Manley*, 1 C. B. 594.) Such also are payments of an annuity, or a legacy secured by powers of distress (*Taylor v. Zamira*, 6 Taunt. 524), and interest due on a mortgage created before

the tenancy (*Johnson v. Jones*, 9 A. & E. 809; *Dyer v. Bowley*, 2 Bing. 94); or after the tenancy. (*Underhay v. Read*, 20 Q. B. D. 209; 57 L. J., Q. B. 129.) But in the latter case, unless the tenancy is binding upon the mortgagee, there must have been an actual payment on demand to the mortgagee, and not merely a notice to pay. (*Wilton v. Dunn*, 17 Q. B. 294; 21 L. J., Q. B. 60; *Hickman v. Machin*, 4 H. & N. 716; 28 L. J., Ex. 310; *Wheeler v. Branscombe*, 5 Q. B. 373; 13 L. J., Q. B. 83.)

Property tax and tithe rent-charge being payable by the landlord, notwithstanding any contract, if they be paid by the tenant, they may be deducted from his rent. (*Franklin v. Carter*, 1 C. B. 750.) There are some taxes also which, in the absence of agreement between the parties, though payable in the first instance by the tenant, may be deducted from his rent. Of these are land tax, sewers rate, &c. (*Ante*, p. 253.) Such deductions in respect of taxes must be made from the next rent due after they are paid, as they cannot afterwards be retained, or recovered by action from the landlord (*Cumming v. Bedborough*, 15 M. & W. 438; *Denby v. Moore*, 1 B. & Ald. 123; *Andrew v. Hancock*, 1 B. & B. 37; *Dawes v. Thomas*, [1892] 1 Q. B. 414), except under a special agreement. (*Lamb v. Brewster*, 4 Q. B. D. 220; 48 L. J., Q. B. 421.) Nor can they be retained until they have been actually paid (*Ryan v. Thompson*, 37 L. J., C. P. 134; L. R., 3 C. P. 144); and the tenant upon making the deduction should be prepared to produce the receipt for the tax.

Or in respect of landlord's taxes.

If by mistake and without fraud the tenant is permitted to make deductions from his rent in respect of outgoings which he ought to have borne himself, and the receipt is given for the balance, expressing it to be such, the deductions are treated as payment, and the landlord cannot afterwards recover the amount so allowed. (*Waller v. Andrews*, 3 M. & W. 312; *Bramston v. Robins*, 4 Bing. 11; *ante*, p. 260.)

Allowances from rent by mistake.

Except in respect of the above payments, or under the Agricultural Holdings Act, 1883 (*post*, Chap. VI.), the tenant cannot, when the rent is distrained for, deduct from or set-off against the rent, sums due from the landlord to him, or payments made on behalf of the landlord. (*Absolom v. Knight*, Bull. N. P. 181; *Andrew v. Hancock*, *supra*.) In an action for the rent, any other liquidated demand may be pleaded by way of set-off. But the tenant cannot

No other set-off allowed on distress.

in an action set off unliquidated damages against rent (*Weigall v. Waters*, 6 T. R. 488) though he may counterclaim for them.

Suspension of rent during eviction.

Upon an eviction by the landlord from the whole or any part of the premises, there is a suspension of the entire rent until the tenant re-enters and resumes possession (*Salmon v. Smith*, 1 Wms. Saund. 204, n. (2); *Neale v. Mackenzie*, 1 M. & W. 747); and an eviction of an under-tenant is an eviction of the tenant. (*Burn v. Phelps*, 1 Stark. 94.) To constitute an eviction which will operate as a suspension of rent, it is not necessary there should be an actual physical expulsion from any part of the premises; but any act of a *permanent* character done by the landlord, or by his procurement, with the intention of depriving the tenant of the enjoyment of the premises as demised, or any of them, will operate as such an eviction. (*Upton v. Townend*, 25 L. J., C. P. 44; 17 C. B. 30.) But there must be an actual dispossession of the tenant, and not a mere constructive eviction or temporary trespass. (*Henderson v. Mears*, 28 L. J., Q. B. 305; *Wheeler v. Stevenson*, 30 L. J., Ex. 46; 6 H. & N. 158; *Newby v. Sharpe*, 8 Ch. D. 39; 47 L. J., Ch. 617.) After an eviction from part of premises held at an entire rent the landlord cannot recover rent under the original contract; and if the tenant thereupon give up possession of the residue, he is entirely discharged; but if he do not give up the residue, he remains liable for the use and occupation thereof. (*Smith v. Raleigh*, 3 Camp. 514.) Rent is not suspended by the destruction of the premises (*ante*, p. 191), or by reason of their becoming uninhabitable through the neglect of the landlord to repair. (*Ante*, p. 196.) And where there is a proviso for abatement of rent in case the premises become uninhabitable through "flood, fire, storm, tempest, or other inevitable accident," the latter words mean accidents *ejusdem generis* with those specified. (*Saner v. Bilton*, 7 Ch. D. 815; 47 L. J., Ch. 267; *Manchester Bonded Warehouse Co. v. Carr*, 5 C. P. D. 507; 49 L. J., C. P. 809.)

Evictions by title paramount or act of law.

If the tenant be evicted from the premises by a title paramount to the landlord's (*Stevenson v. Lambard*, 2 East, 575), or by act of law, as by a railway company under the powers of its Act, the tenant is discharged from the accruing rent (*Clapham v. Draper*, Cab. & E. 484), but not from rent due and in arrear. If in either of those cases there is an eviction from part only of the property, there will be an

apportionment of rent between that taken and that remaining in the tenant's possession, such apportionment in the case of property taken by a railway to be made by the agreement of the parties, or by two justices, or by a jury. (8 & 9 Vict. c. 18, s. 119; *Re Ware*, 9 Ex. 395.) An apportionment also takes place where the landlord resumes possession of part of the property demised under the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 41. 46 & 47 Vict. c. 61, s. 41.

By the common law when a person having a limited interest in land, as a tenant for life, without power of leasing, granted a lease which endured beyond his interest, and died during the interval between two of the rent days, the whole rent from the last day of payment was lost, because the lease determined by the lessor's death, and rent was not apportionable in respect of time. For this state of things a remedy was provided by 11 Geo. 2, c. 19, s. 15, and 4 & 5 Will. 4, c. 22, ss. 1, 2, the combined effect of which was to provide that where the lessor's interest determined by his own death or that of another person, or by any other means, before or on the rent day, the personal representatives of the lessor, or the lessor himself, as the case might be, should be able to recover from the tenant by action a proportionate part of such rent in respect of the time which elapsed between the last rent day and the day of the determination of the lease. (See *Clun's case*, Tud. L. C. R. P. 284, 301, 3rd ed.) Apportionment of rent in respect of time.

Under 11 Geo. 2, c. 19, and 4 & 5 Will. 4, c. 22.

Those acts, however, applied only where the interest of the person entitled was terminated by the death of himself or another, and not as between the real and personal representatives of a person dying seised in fee (*Browne v. Amyot*, 3 Hare, 173; *Re Chulow's Estates*, 3 K. & J. 689); nor to demises not in writing. (*Re Markby*, 4 My. & C. 484; *Mills v. Trumper*, L. R., 4 Ch. 320.) However, by the Apportionment Act, 1870 (33 & 34 Vict. c. 35), it was enacted that rent and all other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall be considered as accruing from day to day, and shall be apportionable in respect of time. (Sect. 2; *Re Lucas*, 55 L. J., Ch. 101.) This enactment comprehends all persons, whatever their interest, and however determined, so that the personal representatives of an owner in fee are entitled as against his heir or devisee to an apportionment of rents reserved to him. (*Capron v. Capron*, L. R., 17 Eq. 288; 43 L. J., Under 33 & 34 Vict. c. 35.

Remedies for
recovering
apportioned
shares.

Ch. 677; *Hasluck v. Pedley*, 44 L. J., Ch. 143; L. R., 19 Eq. 271; *Pollock v. Pollock*, L. R., 18 Eq. 329; *Constable v. Constable*, 11 Ch. D. 681; 48 L. J., Ch. 621.) And the Act is retrospective, applying to all cases, whether the instrument comes into operation before or after the passing of the Act (*Re Cline's Trust*, L. R., 18 Eq. 213; 22 W. R. 512; *Lawrence v. Lawrence*, 26 Ch. D. 795; 53 L. J., Ch. 982); but not where it has been expressly stipulated that there shall be no apportionment. (Sect. 7.) The Act does not alter the day on which the rent becomes payable, but provides that the apportioned part of the rent shall be recoverable when the next entire portion shall become due and not before (sect. 3; *Re United Club and Hotel Co.*, 60 L. T. 665); and persons shall have the same remedies for recovering apportioned parts as for entire portions: provided that persons liable to pay rents reserved out of or charged on lands or other hereditaments of any tenure, and the same lands or other hereditaments, shall not be resorted to for any such apportioned part forming part of an entire or continuing rent as aforesaid specifically, but the entire or continuing rent, including such apportioned part, shall be recovered and received by the heir or other person who, if the rent had not been apportionable under this Act, or otherwise, would have been entitled to such entire or continuing rent, and such apportioned part shall be recoverable from such heir or other person by the executors or other parties entitled under this Act to the same by action at law or suit in equity. (Sect. 4.)

The proviso to the last section only applies where there has been a succession of interest in the reversion. The Act enables a landlord to recover apportioned rent from each tenant for the period during which he was such. Thus, a trustee in bankruptcy or other assignee of a lease who assigns over between two quarter-days is liable for the proportion of rent up to the time of the assignment. (*Swansea Bank v. Thomas*, 4 Ex. D. 94; 40 L. T. 558; *Hopkinson v. Lovering*, 11 Q. B. D. 92; 52 L. J., Q. B. 391. As to apportionment in the case of the winding-up of a company see *Re South Kensington Stores, Ex parte Seymour*, 17 Ch. D. 161; 50 L. J., Ch. 446, and *infra*, Chapter VI.; and see *Hartcup v. Bell*, Cab. & E. 19, 21, where the tenancy was determined by arrangement in the middle of a quarter.)

In *Re Lucas, Parish v. Hudson* (55 L. J., Ch. 101; 54 L. T. 30), the Court of Appeal (Fry, L. J., *diss.*), held

that a clause in a will, by which the testator forgave his tenant rent "due and owing from him at the time of my decease," did not include the rent down to the day of testator's death, but only to the previous quarter day on which the rent was reserved payable.

The Act was held not to apply in the case of a tenant who was dispossessed by title paramount in the middle of a quarter. (*Clapham v. Draper*, Cab. & E. 484.)

Apportionments in respect of estate take place whenever the estate of the landlord becomes vested by conveyance or devolution, or by act of law, in several distinct persons, for then the rent may be divided between the several parts; but, subject to the statute next mentioned, unless the lessee consents to an apportionment it must be made by a jury. (*Bliss v. Collins*, 5 B. & Ald. 866; and see *ante*, p. 275.)

Apportionments in respect of estate.

In the case of leases made after the 31st December, 1881, the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 10, provides that the rent reserved by a lease shall run with the reversion, notwithstanding severance, and shall be capable of recovery by the persons from time to time entitled to the apportioned shares. It would appear that under this Act, when the reversion is severed and the rent properly apportioned, the lessee is bound by such apportionment though he has not assented to it.

44 & 45 Vict. c. 41, s. 10.

In case of non-payment of rent the landlord may either (1) distrain for it; (2) bring an action on the express or implied promise to pay; (3) sue for use and occupation; or (4) if the instrument contain an apt proviso, re-enter for the forfeiture created by non-payment.

Landlord's remedies in case of non-payment of rent.

Of the remedies possessed by a landlord for the recovery of rent, the most important, because the most summary, is that of distress, which will be fully considered in Chap. VI.

(1) DISTRESS.

The landlord, instead of exercising his right of distress, may proceed to recover the rent by action, or, having distrained, if the distress be not sufficient to satisfy the rent, he may then proceed by action for the residue (*Efford v. Burgess*, 1 M. & Rob. 23; *Lear v. Edmonds*, 1 B. & Ald. 157; *Lingham v. Warren*, 2 B. & B. 36; *Philpott v. Lehain*, 35 L. T., N. S. 855); but, having distrained, he cannot bring an action until he has realized the distress, even though it be insufficient to satisfy the rent. (*Lehain v. Philpott*, L. R., 10 Ex. 242; 44 L. J., Ex. 225.)

(2) ACTION.

In an action for rent the writ may be specially indorsed

Arrears of
rent recover-
able.

under R. S. C., 1883, Ord. III., r. 6, even in the case of penalty rents, if claimed as liquidated damages.

The statute 3 & 4 Will. 4, c. 27, s. 42, enacts that no arrears of rent shall be recoverable by any distress, action, or suit, but within six years next after the same shall have become due, or after a written acknowledgment. (*Post*, p. 296.) The Act 3 & 4 Will. 4, c. 42, s. 3, enacts that all actions of debt for rent upon an indenture of demise shall be commenced within twenty years after the cause of action. The result of these two enactments is that, where the lease is not by deed, no arrears of rent beyond six years can be recovered; that if it is by deed with a covenant to pay rent, the landlord, as to arrears not due more than six years, has his remedy by distress, and as to the remainder of the arrears, up to twenty years he has his remedy by action upon the tenant's covenant. (*Paget v. Foley*, 2 Bing. N. C. 679; *Hunter v. Nockolds*, 19 L. J., Ch. 177; *Manning v. Phelps*, 10 Ex. 59; *Darley v. Tennant*, 53 L. T. 257; *Donegan v. Neill* (1885), 16 L. R., Ir. 309; Shelford's R. P. Stats. 249—259, 8th ed.; 2 Dav. Conv. 571, 3rd ed.) The limitation of twelve years imposed by the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57, ss. 1, 8), does not apply to a rent reserved upon a deed of demise. (*Grant v. Ellis*, 9 M. & W. 113; *Donegan v. Neill*, *supra*.)

In the case of a tenancy within the Agricultural Holdings Act, 1883, the right of distress is limited to rent which became due not more than one year before the making of the distress. (46 & 47 Vict. c. 61, s. 44.) There is also a limitation upon the right of distress in the case of a tenant's bankruptcy, and where the tenant is a limited company being wound up. These will be considered at length in Chapter VI.

So long as the relationship of landlord and tenant subsists the right of the landlord to rent is not barred by nonpayment for any length of time, except as to the arrears beyond the period of limitation. (*Archbold v. Scully*, 9 H. L. C. 360.)

Landlord's
right in case
of execution
out of the
High Court

The statute 8 Anne, c. 14, s. 1, provides that no goods or chattels whatsoever in or upon any messuage, lands, or tenements leased for lives, terms of years, or at will, or otherwise, shall be liable to be taken by virtue of any execution, unless the party at whose suit the execution is sued out shall, before the removal of the goods from off

the premises (*Wharton v. Naylor*, 12 Q. B. 673; 17 L. J., Q. B. 278; *White v. Binstead*, 22 L. J., C. P. 115; 13 C. B. 304; *Ex parte Pollen, Re Benn Davis*, 55 L. J., Q. B. 217; 54 L. T. 304), pay to the landlord all such sum or sums of money as are, or shall be, due for rent at the time of taking such goods, provided the said arrears do not exceed one year's rent; and in case they do, the judgment may be executed after paying one year's rent. There must be a tenancy at a rent certain (*Riseley v. Ryle*, 11 M. & W. 16), and the landlord can only claim rent actually due at the time of taking the goods (*Hoskins v. Knight*, 1 M. & S. 245; *Ex parte Pollen, Re Benn Davis, supra*); though he may claim rent payable in advance where so reserved (*Harrison v. Barry*, 7 Price, 690), and he may claim the full rent, though accustomed to remit portion to the tenant. (*Williams v. Lewsey*, 8 Bing. 28.) Rent being due the sheriff must pay, notwithstanding the goods taken are those of a stranger (*Forster v. Cookson*, 1 Q. B. 419; 10 L. J., Q. B. 167); or are goods not liable to distress. (*Riseley v. Ryle*, 11 M. & W. 22.)

The Act does not apply to executions under the warrant of a County Court (a distinct remedy having been provided for such cases; see *infra*, pp. 280, 281), nor to executions at the suit of the landlord himself (*Taylor v. Lanyon*, 6 Bing. 536, 544); nor to executions against a sub-lessee, so as to enable a ground landlord to claim rent on an execution against an underlessee. (*Bennet's Case*, 2 Str. 787; in *Thurgood v. Richardson*, 7 Bing. 428, the contrary was decided, but the earlier decision was not cited.) Neither does the Act apply, unless at the time of the execution there is an existing tenancy, or enable the landlord to claim arrears of rent due under a lease which has expired, or been determined by notice to quit, or by ejectment. (*Cox v. Leigh*, 43 L. J., Q. B. 123; L. R., 9 Q. B. 333; *Hodgson v. Gascoigne*, 5 B. & Ald. 88.) But the tenancy created by an attornment in a mortgage deed is sufficient (*Yates v. Radtledge*, 29 L. J., Ex. 117; 5 H. & N. 249); so is the tenancy created by possession under a contract of purchase at a fixed rent until completion of the purchase. (*Saunders v. Musgrave*, 6 B. & C. 524.)

No landlord of any tenement let at a weekly rent shall have a claim or lien upon any goods taken in execution under the process of any court of law for more than four weeks' arrears of rent; and if such tenement shall be let

to one year's rent,

or to four periodical payments where letting for less than a year.

for any other term less than a year, the landlord shall not have any claim or lien on such goods for more than the arrears of rent accruing during four such terms or times of payment. (7 & 8 Vict. c. 96, s. 67.)

The sheriff's duty is to levy, first, for the rent, and then for the execution (*Colyer v. Speer*, 2 B. & B. 67); and he must satisfy the rent if he know it to be due, though he may not have had express notice from the landlord. (*Riseley v. Ryle*, 11 M. & W. 16, 20; *Bible v. Hussey*, 16 W. R. 710.) He is not bound to inquire from the landlord if any rent is due (*Smith v. Russell*, 3 Taunt. 400); but if he is informed that rent is due it is sufficient to put him on his guard. (*Colyer v. Speer*, *supra*.) There are authorities to the effect that an express demand for the rent by the landlord is necessary to make the sheriff liable. (*Waring v. Dewberry*, 1 Str. 97; *Palgrave v. Windham*, 1 Str. 212; *Gauler v. Chaplin*, 2 Ex. 503; 18 L. J., Ex. 42.)

When rent is claimed the sheriff must ascertain that it is really due, and if there is a lease he is entitled to see it. (*Augustin v. Challis*, 17 L. J., Ex. 73; 1 Ex. 279.) The sheriff is not bound to advance the money to pay the rent out of his own pocket. In practice it is usually advanced by the execution creditor, and if he decline to advance it the sheriff may refuse to sell. (*Cocker v. Musgrove*, 9 Q. B. 223; 15 L. J., Q. B. 365.) But if the sheriff is willing to do so he may sell and pay the landlord's rent and apply the surplus, if any, in satisfaction of the debt, and if there is no surplus may return *nulla bona*. (*Ib.*; *Wintle v. Freeman*, 11 A. & E. 547.)

If the sheriff infringe the statute he is liable to an action (*Calvert v. Joliffe*, 2 B. & Ad. 418), but only where there has been an actual or constructive removal of the goods from the premises. (*Smallman v. Pollard*, 13 L. J., C. P. 116; 6 M. & Gr. 1001; *White v. Binstead*, 22 L. J., C. P. 115; 13 C. B. 304.) The measure of damages of the landlord is *prima facie* the amount of rent due, unless it be shown that the actual value of the goods, as distinguished from their value at a forced sale, was a less amount. (*Thomas v. Mirehouse*, 19 Q. B. D. 563; 56 L. J., Q. B. 653.) But note also 50 & 51 Vict. c. 55, s. 29 (2), (d) (ii.)

In case of
execution out
of County
Court.

The statute 51 & 52 Vict. c. 43, s. 160, after providing that the statute of Anne shall not apply to goods taken in execution under the warrant of a County Court, proceeds, "but the landlord of any tenement in which any such

goods shall be so taken may claim the rent thereof at any time within five clear days from the date of such taking, or before the removal of the goods by delivering to the bailiff or officer making the levy any writing signed by himself or his agent which shall state the amount of rent claimed to be in arrear, and the time for and in respect of which such rent is due; and if such claim be made the bailiff or officer making the levy shall, in addition thereto, distrain for the rent so claimed, and the costs of such distress, and shall not within five days next after such distress sell any part of the goods taken unless they be of a perishable nature, or upon the request in writing of the party whose goods shall have been taken; and the bailiff shall afterwards sell such of the goods under the execution and distress as shall satisfy, first, the costs of and incident to the sale, next, the claim of such landlord, not exceeding the rent of four weeks where the tenement is let by the week, the rent of two terms of payment where the tenement is let for any other term less than a year, and the rent of one year in any other case, and lastly, the amount for which the warrant was issued."

The landlord is entitled to be paid if the execution is lawful, though levied on the goods of a person other than the tenant. (*Hughes v. Smallwood*, 25 Q. B. D. 306; 63 L. T. 198.)

Rent cannot be recovered for premises which have been let for a purpose contrary to the provisions of a statute (*Gas Light and Coke Co. v. Turner*, 6 Bing. N. C. 324), or for an immoral purpose, as for purposes of prostitution (*Smith v. White*, L. R., 1 Eq. 626; 35 L. J., Ch. 454; *Girardy v. Richardson*, 1 Esp. 13); and although not originally let for an immoral purpose, the landlord cannot recover for rent accruing after notice that they are being so used (*Jennings v. Throgmorton*, Ry. & M. 251), even though the user is prohibited by the lease. (*Smith v. White*, *supra*.)

Rent of premises let for an illegal purpose.

A landlord is not entitled in the administration of the estate of a deceased tenant to be paid his rent in priority to other creditors, whether the rent is reserved by deed or by parol. (*Shirreff v. Hastings*, 47 L. J., Ch. 137; 6 Ch. D. 610; 32 & 33 Vict. c. 46, s. 1; 2 Wms. on Exors. 1010, 7th ed.)

No priority for rent in administration suit.

When there is an actual demise by deed the compensation

(3) USE AND OCCUPATION.

Action for
use and
occupation.

for the use of the property is recoverable only as rent. But if a person enters and occupies the lands or premises of another, and there is no lease by deed, the owner of the property can bring an action for compensation in the nature of damages for the use and occupation. This is not only a common-law right (*Gibson v. Kirk*, 1 Q. B. 850), but the 11 Geo. 2, c. 19, s. 14, enacts, that, "it shall be lawful for the landlord, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements or hereditaments held or occupied by the defendant, in an action on the case, for the use and occupation of what were so held or enjoyed; and if in evidence on the trial of such action any parol demise or any agreement (not being by deed), whereon a certain rent was reserved, shall appear, the plaintiffs shall not thereupon be non-suited, but may make use thereof as an evidence of the quantum of the damages to be recovered." The action will lie when there is a lease by a deed only intended as an escrow (*Gudgeon v. Besset*, 6 E. & B. 986), or an agreement under seal not amounting to a demise. (*Elliott v. Rogers*, 4 Esp. 59.) It will also lie after a surrender by operation of law. (*Shaw v. Lomas*, 59 L. T. 477.)

Actual or
constructive
occupation

There must have been an occupation or holding of premises by the defendant, and not merely an agreement to take them. (*Edge v. Strafford*, 1 Cr. & J. 391; *Tourne v. D'Heinrich*, 22 L. J., C. P. 219.) But a person may have constructive occupation of premises, as, where he locks them up and goes away. (*Conolly v. Baxter*, 2 Stark. 527.) And if A. agree to let lands to B., who permits C. to occupy them, B. may nevertheless be sued for use and occupation (*Bull v. Sibbs*, 8 T. R. 327), unless A. recognize and accept C. as tenant. (*Harding v. Crethorn*, 1 Esp. 57.)

under an
undertaking
to pay.

The occupation must have been under an express or implied undertaking to pay for it. (*Birch v. Wright*, 1 T. R. 387; *Churchward v. Ford*, 2 H. & N. 446.) Where a person is let into possession of premises, in contemplation of a lease to be granted, which he afterwards refuses to execute, he is liable for use and occupation. (*Daves v. Dowling*, 22 W. R. 770.) And generally the mere fact of the plaintiff's ownership of the property, and the occupation by the defendant, is sufficient *prima facie* evidence of such an undertaking. (*Hellier v. Sillcox*, 19 L. J., Q. B. 295; *Churchward v. Ford*, *supra*.) But the presumption

from such evidence may be rebutted, by showing that the possession was adverse to the consent of the plaintiff, and was that of a mere trespasser, as in the case of a vendor who continues in possession after conveyance (*Tew v. Jones*, 13 M. & W. 12; except he do so under an agreement, *Metropolitan Rail. Co. v. Defries*, 2 Q. B. D. 387; 36 L. T. 494), or was under a contract with a third party, a stranger to the plaintiff; or by showing other circumstances which are inconsistent with such a contract between plaintiff and defendant (*ib.*; *Knight v. Cox*, 18 C. B. 645; *Sloper v. Saunders*, 29 L. J., Ex. 275; *Levy v. Lewis*, 30 L. J., C. P. 141); as that it was the occupation of an intended purchaser pending a treaty for sale, which went off (*Winterbottom v. Ingham*, 7 Q. B. 611; 14 L. J., Q. B. 298; *Corrigan v. Woods*, Ir. R. 1 C. L. 73; 15 W. R. 318), unless he continued to occupy after it had gone off. (*Howard v. Shaw*, 8 M. & W. 118.) Where an infant procured a lease on the representation that he was of full age, and the lessor sought to have it set aside, it was held that he could not also recover as against the infant damages for use and occupation. (*Lempriere v. Lange*, 12 Ch. D. 675; 27 W. R. 879.) As soon as the occupation ceases, the implied contract ceases; and since no express time is limited for payment, the compensation accrues from day to day.

The assignee of the reversion can maintain an action for use and occupation (*Rennie v. Robinson*, 1 Bing. 147; *Standen v. Christmas*, 10 Q. B. 135) in respect of occupation since the assignment. (*Mortimer v. Preedy*, 3 M. & W. 602.) So can the assignee of a mortgagor who has let the tenant into possession after the mortgage, notwithstanding a notice from the mortgagee claiming rent (*Hickman v. Machin*, 28 L. J., Ex. 310); so can a corporation. (*Rochester v. Pierce*, 1 Camp. 466.) And the action will lie against a corporation which has occupied under a parol contract (*Low v. London & North Western Rail. Co.*, 18 Q. B. 632; 21 L. J., Q. B. 361), but not against an assignee of a tenancy created by a simple contract, who has not occupied the premises. (*How v. Kennett*, 3 A. & E. 659.)

Who may
maintain
action for.

Such an action lies for the enjoyment of a licence, or of incorporeal hereditaments, as for the use of a watercourse (*Davis v. Morgan*, 4 B. & C. 8), or for a right of shooting (*Dawes v. Dowling*, 22 W. R. 770); or for the pasture and eatage of grass (*Sutton v. Temple*, 12 M. & W. 52), or for

the use of veins of minerals (*Jones v. Reynolds*, 4 A. & E. 805), or for furnished (*Cooke v. Moylon*, 16 L. J., Ex. 253; 1 Ex. 67), or unfurnished (*Ison v. Gorton*, 1 Bing. N. C. 501) lodgings.

- (4) **RE-ENTRY.** The landlord may at his option commence proceedings for re-entry if the lease contain a proper proviso for re-entry. The subject of forfeiture for non-payment of rent, and the power of the Courts to relieve against such forfeiture, are more fully considered in Chapter VIII.

CHAPTER VI.

DISTRESS.

SECT. 1.—*Requisites to Right to distrain.*

THE landlord's right to distrain is one given by common law, without any stipulation upon the subject, whenever there is a demise of corporeal hereditaments, at a rent certain, payable on a certain day, and such rent is in arrear. But to give the common law right all those circumstances must be present. And in addition, inasmuch as by the common law rent was incident to the reversion on a lease, a distress can, in general, only be taken by the person who actually, or by estoppel, has the reversion, or who has a statutory power dispensing with the necessity for a reversion.

Requisites to
common law
right to
distrain.

By the contract of the parties, a power of distress may be given "as for rent in arrear" where the common law requisites to give such a right are absent, and for sums which are not rent; such as additional sums reserved upon the non-observance of any stipulations in the lease. (*Pollitt v. Forrest*, 16 L. J., Q. B. 424; 17 *ib.* 291; *ante*, p. 271.) But such a power given merely as a security for a debt would be absolutely void unless conforming to the requirements of the Bills of Sale Acts. Thus, a covenant in a lease giving the landlord power to distrain as for rent in arrear, for the price of goods supplied to the tenant, is void. (*Pulbrook v. Ashby*, 56 L. J., Q. B. 376; *Stevens v. Marston*, 60 L. J., Q. B. 192; 39 W. R. 129; 64 L. T. 274.)

Express
power to
distrain.

Ordinarily, no notice or demand of payment is required as a condition precedent to the right to distrain. But a demand is necessary in the case of a penal rent and of a rent payable at alternative periods, where the landlord, having taken payment at one of the periods for some time, wishes to change to the other alternative period. (*Mallam v. Arden*, 10 Bing. 299.)

Conditions
precedent.

Express power does not destroy common law power.

An express power to distrain may prescribe conditions precedent. Thus, a power to distrain after the rent has been "legally demanded," requires the distress to be preceded by some demand, though not necessarily the formal demand requisite for a re-entry. (*Thorp v. Hart*, 30 Sol. J. 464; but see *Bullen*, 118.) But an express power to distrain contained in a lease does not destroy the common law power, which may be exercised notwithstanding the insertion in the lease of a similar power in affirmative terms, but fettered with restrictions (*Co. Litt.* 204 b; *Re River Sicalc Brick and Tile Works*, 52 L. J., Ch. 638; 32 W. R. 202), though a provision containing negative words implying that the common law right is not to exist is valid. (*Giles v. Spencer*, 26 L. J., C. P. 237; 3 C. B., N. S. 244.) Thus, an agreement that the landlord should not distrain until he had himself paid the rent of the premises due to the superior landlord and produced the receipt for it, was held to be sustainable. (*Ib.*)

The right of distress may be lost, postponed, or suspended, either as against the tenant or a stranger, by an express or implied agreement not to distrain, or by conduct on the part of the landlord inducing the owner of chattels to believe that he will not take them as a distress. (*Fowkes v. Joyce*, 2 Vern. 129; *Horsford v. Webster*, 1 C. M. & R. 696.) And a company, having allowed themselves to be held out as the occupiers of premises upon which goods were deposited for warehousing, were held to be estopped from distraining those goods as landlord, notwithstanding the premises were in fact in the occupation of their tenant. (*Miles v. Furber*, L. R., 8 Q. B. 77; 42 L. J., Q. B. 41.)

(1) *An actual demise.*

There must be an actual existing demise. The common law right of distress does not exist before the relationship of landlord and tenant is complete, nor after it has determined. Formerly, a mere entry under an agreement for a lease (not amounting to an actual demise) did not until payment or acknowledgment of rent due by the tenant constitute the relationship of landlord and tenant, or entitle the owner of the property to distrain. (*Hegan v. Johnson*, 2 Taunt. 148; *Regnart v. Porter*, 7 Bing. 451; *Dunk v. Hunter*, 5 B. & Ald. 322; *Watson v. Ward*, 22 L. J., Ex. 161.) This, as we have seen (*ante*, pp. 75, 113), is no longer the law; and now, possession taken by the tenant under an agreement for a tenancy which can be specifically enforced, gives the landlord the right to distrain even for

rent in advance, if the agreement so provide. (*Walsh v. Lonsdale*, 21 Ch. D. 9; 52 L. J., Ch. 2; 46 L. T. 858; 31 W. R. 109;—it is to be observed, however, that in this case the tenant had paid rent, and therefore the distress was valid at common law. *Lee v. Smith*, 23 L. J., Ex. 198.)

A landlord may distrain under a tenancy at will at a fixed rent, as where there was an agreement for a lease of premises at a specified rent, with a proviso that until the lease should be executed the rent, covenants, and agreements agreed to be therein reserved and contained should be paid and observed. (*Anderson v. Midland Rail. Co.*, 30 L. J., Q. B. 94.)

An agreement for the sale of premises, under which the purchaser, having paid a deposit, entered into possession, and for the purpose of securing the payment of the balance of the purchase-money and performance of the other stipulations admitted himself to be a tenant thereof at a weekly rent, was held to confer a right of distress on the vendor. (*Yeoman v. Ellison*, L. R., 2 C. P. 681; 36 L. J., C. P. 326.)

When the tenancy ends the common law right of distress is gone. (Co. Litt. 47 b.) A statutory power, however, exists during six months after its determination. (*Infra*, p. 295.) But, where a tenancy has determined by notice to quit, and the tenant holds over after the notice has expired, the landlord cannot distrain for the rent of the period for which the tenant holds over, without some evidence of a renewal of the tenancy. (*Jenner v. Clegg*, 1 M. & Rob. 213; *Williams v. Stiven*, 9 Q. B. 14.) Neither can the landlord distrain after treating the tenant as a trespasser by bringing an ejectment for forfeiture. (*Bridges v. Smyth*, 5 Bing. 410; and see *Grimwood v. Moss*, 41 L. J., C. P. 239; L. R., 7 C. P. 360.)

If a tenant be evicted by title paramount but remain in possession under a new tenancy created by agreement with his evictor, his original landlord cannot distrain. (*Hopcraft v. Keys*, 9 Bing. 613.) A landlord cannot distrain after an actual surrender of the term; but an incomplete surrender leaves the tenancy, together with the right to distrain, still subsisting. (*Coupland v. Maynard*, 12 East, 134.)

The common law right of distress exists only in respect of rent. (*Ante*, pp. 96, 261.) A rent must be reserved out of lands and tenements. There can be no common (2) *Rent issuing out of corporeal hereditaments.*

law right of distress for a payment in the nature of rent reserved upon a letting of incorporeal hereditaments (Co. Litt. 47 a); but upon a demise of the vesture or herbage of land a rent may be reserved, and cattle upon the land distrained. (*Ib.*) A mere licence (*ante*, p. 69), as of standing room for machines with driving power, is not a demise, and does not carry the right of distress. (*Hancock v. Austin*, 14 C. B., N. S. 634; 32 L. J., C. P. 252.) But the exclusive use of a room in a mill, with a supply of driving power, is a demise, and the payment reserved a rent. (*Selby v. Greaves*, L. R., 3 C. P. 594; 37 L. J., C. P. 251; *Marshall v. Schofield*, 31 W. R. 134; 52 L. J., Q. B. 58.) Sums reserved for the use of chattels confer no right of distress, but when chattels are let with houses or land at one entire sum the payment issues out of the land, and is rent, and may be distrained for. (*Ante*, p. 262.) Such is the case of ready-furnished lodgings. (*Newman v. Anderton*, 2 B. & P., N. R. 224.) Rents reserved by way of penalty for breaking up meadow land, carrying hay off the premises or the like, may be distrained for. (*Pollitt v. Forrest*, 11 Q. B. 949; 16 L. J., Q. B. 424; *ante*, p. 271.)

(3) *Rent certain.*

A distress can only be taken for a rent which is certain. (*Ante*, p. 270.) It is sufficiently certain where, although fluctuating and variable, it may be reduced to a certainty by computation, or the happening of specified events (*Ex parte Voisey, Re Knight*, 21 Ch. D. 442; 52 L. J., Ch. 121), as a rent of so much per thousand for bricks made (*Daniel v. Gracie*, 6 Q. B. 145; 13 L. J., Q. B. 309); or in a lease of a weaving shed, a rent of so much per loom run by the lessee. (*Walsh v. Lonsdale*, 21 Ch. D. 9.) And where a tenant entered under an agreement for a lease which did not state the amount of rent to be paid, and no lease was ever executed, but the tenant paid a certain rent for two years, it was held that the landlord might distrain for the like rent subsequently becoming due. (*Knight v. Benett*, 3 Bing. 361.) If a lease of premises, at one entire rent, is void as to part of the premises, the rent is not apportionable so as to enable the lessor to distrain for part. (*Neale v. Mackenzie*, 1 M. & W. 747; *Gardiner v. Williamson*, 2 B. & Ad. 336.)

(4) *Rent in arrear.*

A landlord cannot distrain until rent is in arrear, that is, until the day after the day on which it is made payable. (*Dibble v. Bowater*, 22 L. J., Q. B. 396.) But

being in arrear his right is not suspended by taking a security for the rent (*ante*, p. 267); nor by an agreement to take interest on the arrears. (*Skerry v. Preston*, 2 Chitt. 245.) Rent reserved payable in advance may be so distrained for. (*London and Westminster Loan Co. v. London and North Western Rail. Co.*, 37 S. J. 497.) If, under the reservation, the tenant have any days of grace for payment, the distress cannot be made before they have expired. (*Ante*, p. 264.)

We have previously (*ante*, p. 272), pointed out what payments made by the tenant to preserve his possession are treated as having been made *pro tanto* in satisfaction of the rent itself. But with these exceptions, the general rule of law is that there is no right of set-off against a distress for rent, notwithstanding the tenant may have a well-founded claim for an equal or greater amount. (*Ante*, p. 273; *Absolom v. Knight*, Bull. N. P. 181; *Laycock v. Tufnell*, 2 Chitt. 531; *Townrow v. Benson*, 3 Madd. 203; *Pratt v. Keith*, 33 L. J., Ch. 528.) As to holdings to which the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), applies, however, it is provided by sect. 47 that where compensation due under the Act, or under any custom or contract, has been ascertained before the landlord distrains for rent due, the amount of such compensation may be set off against the rent due, and the balance only distrained for.

Right of set-off against a distress.

Where a lease reserves a certain rent, an agreement in the same lease to allow the tenant out of the rent a given sum for a stipulated purpose, does not amount to a diminution or alteration of the rent so as to prevent the landlord from distraining for the entire amount, but is a mere covenant upon which the tenant may have his remedy by action. (*Mason v. Chambers*, Cro. Jac. 34; *Davies v. Stacey*, 12 A. & E. 506.)

Agreement to allow sums out of rent does not diminish rent.

In order that the landlord may, without express agreement, have the right to distrain, he must at the time of distress have a reversion in himself (Bullen, 26), though it is immaterial how short that reversion be. If a tenant underlet for any period of time shorter than his own interest, though only by a day, he has a reversion sufficient to entitle him to distrain. (*Wade v. Marsh*, Latch. 211.) So has a tenant from year to year, underletting from year to year (*Curtis v. Wheeler*, M. & M. 493; *Pike v. Eyre*, 9 B. & C. 909), or for a term of years if the original tenancy

(5) A legal reversion in distrainor.

from year to year lasts beyond that term. (*Oxley v. James*, 13 M. & W. 214.) But if a person transfer all his interest in a term to another, although he reserve a rent, he cannot, for want of a reversion, distrain for the rent unless he has also reserved a power of distress; and it is immaterial whether the instrument purport to be an assignment or an underlease (— *v. Cooper*, 2 Wils. 375; *Preece v. Corrie*, 5 Bing. 24; *post*, Chap. X.), or that it contains a stipulation that the transferee is to be tenant to the transferor during the term (*Parmenter v. Webber*, 8 Taunt. 593), or that the transferee has paid or agreed to pay money as rent. (*Hazel-dine v. Heaton*, Cab. & E. 40.) If a tenant underlet, reserving a reversion, he cannot distrain after his term has expired, though his tenant continues to hold. (*Burne v. Richardson*, 4 Taunt. 720.) The granting of a second lease to commence on the expiration of the existing one is not parting with the reversion. (*Smith v. Day*, 2 M. & W. 684.)

Reversion by
estoppel.

The reversion need not be an actual one; it is sufficient if it be a reversion by estoppel. Thus, if a person attorns or acknowledges himself the tenant of another, or is let into possession under a demise by him, he is estopped from denying that a reversion exists. (*Evans v. Matthias*, 26 L. J., Q. B. 309; *Jolly v. Arbuthnot*, 28 L. J., Ch. 552; *Morton v. Woods*, 37 L. J., Q. B. 242; L. R., 4 Q. B. 293.)

SECT. 2.—*Who may distrain.*

When right
to distrain
without
having a
reversion;

In particular cases, a landlord not having a legal reversion, may nevertheless distrain for rent. In some cases, the power is of common right, as where a rent is granted for equality of partition by one coparcener to another, and in other cases the right is conferred by statute.

in case of
person benefi-
cially entitled
to the rent;

By sect. 10 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), rent reserved by a lease shall be capable of being recovered, and impliedly distrained for, by the person from time to time entitled, subject to the term, to the income of the land leased, that is, the beneficial owner as well as the legal reversioner.

on assignment
of the rever-
sion;

If a landlord assign his reversion, he loses his right to distrain for arrears of rent due at the date of assignment. The assignment gives the assignee the title to the rent to become due on the next day for payment of rent after the assignment, but not for the antecedent rent, for the latter is severed from the reversion and becomes a mere chose in

action. (*Flight v. Bentley*, 7 Sim. 149; *Staveley v. Alcock*, 16 Q. B. 636; 20 L. J., Q. B. 320.)

If the landlord sell the property, and the purchaser pay his purchase money, but no conveyance is executed, the vendor is a trustee for the purchaser, and although he has the legal right to distrain, he will not be allowed to do so contrary to the wishes of the purchaser. (*Re Powers, Manisty v. Archdale*, 63 L. T. 626; 39 W. R. 185.)

If a lessor die, the person who in law is entitled to the reversion may distrain for rent subsequently becoming due; the lessor's executors or administrators for that which accrued in his lifetime; it having been provided by 3 & 4 Will. 4, c. 42, s. 37, that it shall be lawful for the executors or administrators of any lessor or landlord to distrain upon lands demised for any term or at will for the arrears of rent due to such lessor or landlord in his lifetime, in like manner as such lessor or landlord might have done in his lifetime; and by sect. 38, that such arrears may be distrained for after the end or determination of such term or lease at will in the same manner as if such term or lease had not determined: provided that such distress be made within the space of six calendar months after the determination of such term or lease, and during the continuance of the possession of the tenant from whom such arrears became due; and all the provisions in the several statutes relating to distresses for rent shall be applicable to the distresses so made. If a lessee grant an underlease and die, the reversion and the rent accruing after his death as incident to it will go to his personal representative. An executor may distrain before obtaining probate (*Whitehead v. Taylor*, 10 A. & E. 210); but an administrator cannot distrain until after grant of letters of administration. (*Woolley v. Clark*, 5 B. & Ald. 745.)

on death of
lessor.

3 & 4 Will. 4,
c. 42, ss. 37, 38.

Where a married woman is entitled to the reversion as her separate property, or has a reversion by estoppel, she may distrain, not otherwise. At common law, and before the Married Women's Property Act, 1882, she could in no case distrain alone. Her husband, either alone or by joining her, might do so during her lifetime, whether her reversion was leasehold or freehold, but the common law right in the case of land in which she had a freehold interest was confined to rents accrued during her lifetime. However, by statute, where a husband has a freehold interest in right of his wife in any rents, and the same

Married
women.

Husband in
right of wife.

shall not be paid in the wife's lifetime, the husband, after the death of the wife, may have an action or distrain for such arrears in the same manner as he might have done in his wife's lifetime. (32 Hen. 8, c. 37, s. 3.)

Mortgagee.

A mortgagee, after giving notice to the tenant in possession under a lease made prior to the mortgage, may distrain for the rent in arrear at the time of the notice, as well as for rent accruing due after such notice. (*Moss v. Gallimore*, 1 Sm. L. C. 604, 9th ed.; *ante*, p. 268.) So where the lease, though made by the mortgagor after the mortgage, is in pursuance of a power conferred by the mortgage deed (*Rogers v. Humphreys*, 4 A. & E. 314), or in pursuance of the statutory power conferred by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 18. (*Ante*, p. 54; *Municipal Permanent, &c. Building Society v. Smith*, 22 Q. B. D. 70; 58 L. J., Q. B. 61.) But where the tenancy has not been created under any such power as aforesaid, and the tenant became such to the mortgagor after the mortgage, the mortgagee cannot distrain unless he has received rent from the tenant, or the tenant has acknowledged a tenancy between himself and the mortgagee. (*Rogers v. Humphreys*, 4 A. & E. 299; *Doe v. Boulter*, 6 A. & E. 675.) A mere notice by the mortgagee to the tenant to pay rent to him will not give the former the right to distrain, unless the tenant acquiesce in it. (*Evans v. Elliot*, 9 A. & E. 342; *Towerson v. Jackson*, 65 L. T. 332; [1891] 2 Q. B. 484; 61 L. J., Q. B. 36; *ante*, p. 269.) The effect of acquiescence is not to affirm the lease made by the mortgagor, but to create a new tenancy from year to year between the lessee and the mortgagee. (*Corbett v. Plowden*, 25 Ch. D. 678; 54 L. J., Ch. 109; 32 W. R. 667.) If after notice, however, the tenant refuse to pay rent, the mortgagee may evict him, but cannot recover the rent in arrear in the form of mesne profits (*ante*, p. 269), notwithstanding some *dicta* to the contrary in *Pope v. Biggs* (9 B. & C. 245). In the case of a mortgagor in possession, the mortgagee cannot distrain, unless by attornment or otherwise the relation of landlord and tenant is clearly established between them (*Morton v. Woods*, 37 L. J., Q. B. 242; L. R., 3 Q. B. 658; *Ex parte Parke, Re Potter*, L. R., 18 Eq. 381; 43 L. J., Bkey. 139, *ante*, p. 15); and under a stipulation that upon default of certain payments (which happened) the mortgagor should hold the premises as yearly tenant, it was held that the mortgagee was not entitled to treat the mortgagor as

tenant until he had given him notice of his intention so to do. (*Clowes v. Hughes*, 39 L. J., Ex. 62; L. R., 5 Ex. 160; and see *Gibbs v. Cruikshank*, 28 L. T., N. S. 104, 735.) But an attornment clause in a mortgage dated since the 1st November, 1882, would be void for the purposes of distress, unless registered under the Bills of Sale Acts. (*Ante*, p. 16.)

A mortgagor may distrain for rent due under a lease granted by himself after the mortgage by virtue of the estoppel. (*Alchorne v. Gomme*, 2 Bing. 54; *Wilkinson v. Hall*, 3 Bing. N. C. 508.) But for arrears of rent due under a lease granted by the mortgagor prior to the mortgage, the mortgagor cannot distrain, as the privity of estate between himself and the tenant is destroyed; he can only do so in the name of the mortgagee, and as his bailiff. (*Moss v. Gallimore*, 1 Sm. L. C. 604, 9th ed.) But he may justify the distress as bailiff, although he said at the time of taking that he distrained for rent due to himself. (*Trent v. Hunt*, 9 Ex. 14; 22 L. J., Ex. 318; *Reece v. Strousberg*, 54 L. T. 133.) And where the mortgage is paid off by an assignee of the equity of redemption, who takes an undertaking from the mortgagee to execute a transfer, there is an implied authority to the assignee to distrain in the name of the mortgagee. (*Snell v. Finch*, 32 L. J., C. P. 117; 11 W. R. 341.)

If the lessors be joint tenants all must join in the distress, but one may distrain in the names of all, or appoint a bailiff on behalf of all. (*Robinson v. Hofman*, 4 Bing. 562.) If after rent becomes due the joint tenancy is severed by one of the joint tenants conveying away his interest, the right of distress for such rent is lost. (*Staveley v. Alcock*, 16 Q. B. 636; 20 L. J., Q. B. 320.) But a surviving joint tenant may distrain for arrears accrued in the lifetime of his deceased companion. (Bullen, 47.) If one joint tenant let his share to his companion, he may distrain for the rent reserved. (*Cowper v. Fletcher*, 6 B. & S. 464; 34 L. J., Q. B. 187.)

Coparceners like joint tenants must all join in the distress, though in that case also one may distrain in the names of all. (*Leigh v. Shepherd*, 2 B. & B. 465.) But tenants in common, as they have several titles, may distrain severally, each for his own share of the rent (*Whitley v. Roberts*, M'Clel. & Y. 107); or one may distrain in the names of all, if not forbidden by the others to do so.

Mortgagor.

Joint tenants.

Parceners.

Tenants in common.

(*Culley v. Spearman*, 2 H. Bl. 386.) But if a tenant pay the whole rent to one of two tenants in common after being forbidden to do so by the other, the latter may distrain for his share of rent. (*Harrison v. Barnby*, 5 T. R. 246.)

Receivers.

A receiver appointed by the High Court of Justice may distrain without application to the Court; but he must distrain in the name of the person entitled to the rent, and if there be any doubt upon the point he may apply to the Court for an order. (*Pitt v. Snowden*, 3 Atk. 750; *Brandon v. Brandon*, 5 Madd. 473.) If he have granted the lease in his own name, he may distrain in his own name. (*Dancer v. Hastings*, 12 Moore, 34.) A person merely authorized to receive rents cannot distrain (*Ward v. Shew*, 9 Bing. 608); but a receiver appointed by mortgagor and mortgagee, with express power to distrain, may do so. (*Jolly v. Arbuthnot*, 28 L. J., Ch. 547; 4 De G. & J. 224.)

A receiver appointed by a mortgagee under the powers conferred by the Conveyancing Act, 1881, may distrain. (44 & 45 Vict. c. 41, s. 24, subs. 3.)

Parish officers.

Any one churchwarden or overseer may authorize a distress for rent under 59 Geo. 3, c. 12, s. 17. (*Gouldsworth v. Knight*, 11 M. & W. 337.)

SECT. 3.—*When to be made.*

When distress may be made.

A distress for rent must be made in the daytime, that is, after sunrise and before sunset. (*Aldenburgh v. Peaple*, 6 C. & P. 212; *Tutton v. Darke*, 5 H. & N. 647; 29 L. J., Ex. 271.) But where the grantee of a bill of sale was about to remove goods, and the landlord came after sunset for the purpose of distraining, and, in order to be in a position to distrain the next morning, told the grantee he should prevent the goods being removed, and the grantee thereupon made no further effort to remove the goods; it was held, that the landlord was not liable to an action for conversion. (*England v. Cowley*, L. R., 8 Ex. 126; 42 L. J., Ex. 80.)

A distress cannot be made on Sunday. (29 Car. 2, c. 7, s. 6.)

At common law a landlord could not distrain after the termination of the tenancy. (*Williams v. Stiven*, 9 Q. B. 14; 15 L. J., Q. B. 321.) To remedy this it was provided by 8 Anne, c. 14, that any person having any rent in arrear or due upon any lease for life or lives, or for years, or at will, ended or determined, might distrain for such arrears after the determination of the said respective leases, in the same manner as they might have done if such lease had not been ended or determined (sect. 6); provided that such distress be made within six calendar months after the determination of such lease, and during the continuance of such landlord's title or interest, and during the possession of the tenant from whom such arrears became due. (Sect. 7.) The statute only applies when the tenancy determines by effluxion of time or notice to quit; not when it determines by forfeiture (*Grimwood v. Moss*, 41 L. J., C. P. 239; L. R., 7 C. P. 360, *per* Willes, J.; *Kirkland v. Briancourt*, 6 Times L. R. 441), or disclaimer. (*Doe v. Williams*, 7 C. & P. 322.) It is not necessary, in order to give the landlord this statutory right, that the tenant should continue in possession of the whole of the demised premises (*Nuttall v. Staunton*, 4 B. & C. 51); and the right exists whether the continuance in possession be tortious or by permission. (*Ib.*; *Taylorson v. Peters*, *infra*, *per* Patteson, J.) But there must be something to show an intention to continue in possession (*Gray v. Stait*, 11 Q. B. D. 668; 52 L. J., Q. B. 412); and where the tenant gave up possession to the incoming tenant, and without the latter's permission left some cattle on the premises, it was held that this was not a continuance in possession so as to entitle the landlord to distrain. (*Taylorson v. Peters*, 7 A. & E. 110.) If the lessee of a term die before the expiration of the term, and his personal representatives continue in possession after the expiration of the term, they are liable to distress for arrears of rent due in the lessee's lifetime (*Braithwaite v. Cooksey*, 1 H. Bl. 465); but not if the tenancy is at will and determines by death, for then both the tenancy and the possession of the tenant from whom the rent accrued are at an end. (*Turner v. Barnes*, 2 B. & S. 435; 31 L. J., Q. B. 170.)

After the
tenancy has
expired.

Where by the custom of the country (*Beavan v. Delahay*, 1 H. Bl. 5), or the agreement of the parties (*Knight v. Benett*, 3 Bing. 364), the tenant leaves his away-going crops in the barns or stacked on the premises, this is con-

sidered as a prolongation of the tenancy, and not a mere continuance in possession (*post*, Chap. IX., Sect. 3), and entitles the landlord to distrain without the aid of the statute.

SECT. 4.—*For what Arrears.*

Six years' arrears.

No distress for arrears of rent can be made except within six years next after they became due, or next after a written acknowledgment of the same shall have been made. (3 & 4 Will. 4, c. 27, s. 42; *Strachan v. Thomas*, 12 A. & E. 536; *ante*, p. 278.) But the right to distrain for six years' arrears subsists as long as the relationship of landlord and tenant continues, notwithstanding the non-payment of rent for any number of years. (*Archbold v. Scully*, 9 H. L. 360.)

In the case of agricultural holdings.

A distress in the case of holdings to which the Agricultural Holdings Act, 1883, applies, is limited to rent which became due in respect of such holdings not more than one year from the making of such distress; except, that where by the ordinary course of dealing between the landlord and tenant the payment has been allowed to be deferred until the expiration of a quarter or half year after the date when legally due, then it shall be deemed to have become due at the expiration of such quarter or half year as aforesaid. (46 & 47 Vict. c. 61, s. 44.) This would only seem to include a case where the time allowed is a quarter or half year, and not where it is less than a quarter of a year.

It does not, however, prevent the landlord from distraining for more than a year's rent, but only from distraining for rent more than a year overdue according to the customary time of payment. (*Ex parte Bull, Re Bew*, 18 Q. B. D. 642; 56 L. J., Q. B. 270.)

In case of tenant's bankruptcy.

A further limitation is provided in the case of a tenant who becomes bankrupt. By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 42, the landlord or other person to whom any rent is due from the bankrupt may at any time, either before or after the commencement of the bankruptcy, distrain upon the goods and effects of the bankrupt, with this limitation, that if such distress for rent be levied after the commencement of the bankruptcy, it shall

be available only for one year's [now six months, 53 & 54 Vict. c. 71, s. 28] rent accrued due prior to the date of the order of adjudication (*Ex parte Dyke, Re Morrish*, 22 Ch. D. 410; 52 L. J., Ch. 570); but the landlord may prove under the bankruptcy for the surplus for which the distress may not have been available.

"Six months" is an unfortunate expression, since six calendar months are not the same as half a year.

The term "order of adjudication" shall be deemed to include an order for the administration of the estate of a debtor whose debts do not exceed 50%, or of a deceased person who dies insolvent. But it is confined to orders made in pursuance of the provisions of the Bankruptcy Act, and does not apply to an order for the administration of an insolvent's estate in the Chancery Division. (*Re Fryman*, 38 Ch. D. 468; 57 L. J., Ch. 862.)

Distress and proof are the only methods by which a landlord can recover arrears of rent accrued before the date of adjudication. He cannot set off such arrears against a claim for tillages at the expiration of the tenancy. (*Alloway v. Steere*, 52 L. J., Q. B. 38; 10 Q. B. D. 22.)

The 42nd section applies only to the goods and effects of the bankrupt, and places no restriction upon the right of distress over the goods of a stranger. (*Brocklehurst v. Laue*, 7 E. & B. 176; 26 L. J., Q. B. 107.) It is also restricted to rent accrued before the order of adjudication. If the trustee remain in possession, not having disclaimed the lease, the landlord may without leave of the Court distrain goods upon the premises, for all rent accruing due after the adjudication, even though it be payable in advance. (*Ex parte Hale*, 1 Ch. D. 285; 45 L. J., Bkcy. 21.)

The object of the section was to preserve the common law right of landlords and persons having a right analogous to that of a landlord's right of distress. (*Ex parte Hill, Re Roberts*, 6 Ch. D. 63; 46 L. J., Bkcy. 116.) Therefore, while it sanctions a distress by a gas company authorized by statute to recover rents and charges by the same means as landlords may recover rent in arrear (*Ex parte Birmingham and Stafford Gas Co.*, L. R., 11 Eq. 615; 40 L. J., Bkcy. 52; *Ex parte Harrison, Re Peake*, 53 L. J., Ch. 977; 13 Q. B. D. 753), it does not permit a distress by a gas company having a mere ordinary power of distress which is in the nature of an execution. (*Ex parte Hill, Re Roberts, supra.*) An attornment, as we have seen (*ante*, p. 15),

creates the relationship of landlord and tenant, and though the 42nd section does not sanction a distress under an attornment clause in a mortgage where the attornment is at a sham rent and merely a device to defeat the operation of the bankruptcy laws (*Ex parte Williams, Re Thompson*, 47 L. J., Bkey. 26; 7 Ch. D. 138), still, where the rent, though large, is not unreasonable, and there is nothing from which it can be inferred that the object of the clause is to defeat the bankruptcy laws, an attornment clause does create a real tenancy, and unless void under the Bills of Sale Acts, gives to the mortgagees the rights conferred on landlords by sect. 42 of the Bankruptcy Act. (*Re Stockton Iron Furnace Co.*, 10 Ch. D. 335; 48 L. J., Ch. 417; *Ex parte Jackson, Re Bowes*, 14 Ch. D. 725; 29 W. R. 253; *Ex parte Voisey, Re Knight*, 21 Ch. D. 442; 52 L. J., Ch. 121; *Re Threlfall, Ex parte Queen's Benefit Building Society*, 16 Ch. D. 274; 50 L. J., Ch. 318.) And a distress under an attornment clause in a second mortgage is valid, notwithstanding a prior mortgage to a different mortgagee also contains an attornment clause. (*Ex parte Punnett, Re Kitchen*, 16 Ch. D. 226; 50 L. J., Ch. 212.) An attornment clause is a security for the principal as well as the interest, and if the distress realize more than the interest, the mortgagee may apply the surplus in reduction of the principal. (*Ex parte Harrison, Re Betts*, 18 Ch. D. 127; 50 L. J., Ch. 832.) The landlord need not obtain the leave of the Court before distraining. (*Ex parte Till*, L. R., 16 Eq. 97; 42 L. J., Bkey. 84; *Ex parte Cochrane, Re Mead*, L. R., 20 Eq. 282; 23 W. R. 726.)

The preferential claims, in favour of which a distress will be postponed in the event of bankruptcy, are subsequently considered. (*Infra*, p. 309.)

SECT. 5.—*Goods Distrainable.*

What may be
distrained.

Unless privileged under some exception established at law, all personal chattels upon the premises, to whomsoever belonging, are liable to be distrained. Chattels privileged from distress are of two classes: (1) those which are absolutely privileged; and (2) those which are conditionally privileged, *i.e.* are only to be distrained upon the supposition that there is no sufficient distress besides.

Of the class of chattels absolutely exempt from distress are chattels so attached to the freehold as to become fixtures. In a later part of the work (Chap. IX., Sect. 1) we consider fully by what means chattels placed upon the premises lose their chattel character. The exemption of fixtures from distress rests upon two reasons, first, they are not chattels at all, but form part of the thing demised; and secondly, as the distress was only a pledge, fixtures could not be restored in the same condition as when taken. (Gilb. Dist. 38; *Hellawell v. Eastwood*, 6 Ex. 295; 20 L. J., Ex. 154; *Turner v. Cameron*, L. R., 5 Q. B. 306; 39 L. J., Q. B. 125.) Upon the sole ground that they are parcel of the freehold by construction of law, keys, doors, windows, shutters, furnaces, or the like are exempt from distress. (*Ib.*; *Simpson v. Hartopp*, 1 Sm. L. C. 463.) Nor does a temporary disunion, as in the case of the removal of a smith's anvil or a millstone for the purpose of repair, destroy or suspend the privilege. (*Gorton v. Falkner*, 4 T. R. 567.) On the ground that they cannot be restored in the same plight as before distress, even fixtures, which, as between landlord and tenant, are removable by the latter, are exempt from distress (*Darby v. Harris*, 1 Q. B. 895; 10 L. J., Q. B. 294; *Pitt v. Shew*, 4 B. & Ald. 206); though they may be taken under an execution. (*Poole's case*, 1 Salk. 368; *Beaufort v. Bates*, 31 L. J., Ch. 481.) But merely including fixtures in a notice of distress, if no actual seizure and severance take place, will not make the landlord liable as for an unlawful distress. (*Beck v. Denbigh*, 29 L. J., C. P. 273.) Machinery, merely attached to the freehold for its more convenient use as a chattel, retains its chattel character and may be distrained. (*Hellawell v. Eastwood*, *supra*.)

Chattels absolutely privileged from distress.

Fixtures.

For the benefit of trade, to encourage which is for the public advantage, goods delivered to a person exercising a public trade to be carried, wrought, worked up, managed or dealt with in the way of his trade or employ, are privileged from distress. (*Simpson v. Hartopp*, 1 Sm. L. C. 463, 9th ed.) To come within the exemption the tenant must carry on a "public trade." This has been defined as a trade or employ carried on generally for the benefit of any persons who choose to avail themselves of it, as distinguished from a special employment by one or particular individuals. (*Muspratt v. Gregory*, 1 M. & W. 653, *per Parke*, B.; *Tapling v. Weston*, Cab. & E. 99.) The well

Goods delivered to persons to be dealt with in the way of their trades.

established examples within the rule are, a horse standing in a smith's shop to be shod; sacks of corn delivered to a miller to be ground (Co. Litt. 47 a); yarn or silk intrusted to a weaver for manufacture (*Wood v. Clarke*, 1 Cr. & J. 484; *Gibson v. Ireson*, 3 Q. B. 39); cattle sent to a carcase butcher to be slaughtered (*Brown v. Shevill*, 2 A. & E. 138); goods delivered to a carrier for carriage (*Gisbourn v. Hurst*, 1 Salk. 250); to a factor (*Gilman v. Elton*, 3 B. & B. 75), or a commission agent (*Findon v. M'Laren*, 6 Q. B. 891), for sale; or to an auctioneer for sale at auction (*Adams v. Grane*, 1 Cr. & M. 380; *Williams v. Holmes*, 8 Ex. 861; but see *Brown v. Arundell*, 10 C. B. 54); goods pledged with a pawnbroker (*Suire v. Leach*, 18 C. B., N. S. 479); or warehoused with a wharfinger (*Thompson v. Mashiter*, 1 Bing. 283), or a granary keeper (*Matthias v. Mesnard*, 2 C. & P. 353), for safe keeping; and furniture warehoused at a furniture depository (*Miles v. Furber*, L. R., 8 Q. B. 77; 42 L. J., Q. B. 41), all of which are privileged. But where an agent under an agreement with a firm of carpet manufacturers took premises and put his principal's name outside as well as his own, and was entitled to carry on other agency business, but was in fact agent for only one other firm, it was held that the agent was not carrying on a public business. (*Tapling v. Weston*, Cab. & E. 99.)

In the second place the goods must be actually or constructively sent or delivered by a person having a right to the immediate possession of them to the trader on whose premises they are at the time of distress. (*Clarke v. Millwall Dock Co.*, 55 L. J., Q. B. 378; 17 Q. B. D. 494.) Thus, a ship in process of construction in a dry dock upon terms that it was to be paid for by instalments proportioned to the value of the work executed, and that upon payment of the instalments so much of the work as was executed should vest in the purchaser, was distrained upon when near completion for the rent of the dock, and it was held that the ship had not been sent or delivered to the builder within the rule. (*Ib.*)

In the third place the goods must be delivered to the tenant to be dealt with in the ordinary way of his trade. Thus, there was held to be no privilege in the case of a boat, not placed under the tenant's care, nor left for the purpose of being in any way dealt with by the tenant, but sent to and lying at salt works for the purpose of receiving

and carrying away salt bought by the owner. (*Muspratt v. Gregory*, 3 M. & W. 677.) And so, although casks left with a cooper for repair would be privileged, casks sent with beer to a public-house, to be left until the beer is consumed, are not. (*Joule v. Jackson*, 7 M. & W. 450.) Wine deposited at a wine warehouse to mature was held not to be exempt. (*Ex parte Russell*, 18 W. R. 753.)

It is difficult to find any sound principle on which all the cases can be reconciled (*Clarke v. Millwall Dock Co.*, 55 L. J., Q. B. 378; 17 Q. B. D. 494, *per* Herschell, L. C.), and in the application of the rule we are obliged to be guided by the specific instances which have occurred. (*Swire v. Leach*, 18 C. B., N. S. 479; 34 L. J., C. P. 150, *per* Erle, C. J.) It was laid down in *Parsons v. Gingell* (4 C. B. 545; 16 L. J., C. P. 227), that if articles are sent to a place to remain there, they are distrainable; but if sent for a particular purpose, and remaining at the place be an incident necessary for the completion of the object, they are not; and under the former part of the proposition it was held, that horses and carriages standing at livery were not exempt. (*Ib.*; *Francis v. Wyatt*, 3 Burr. 1498). Later cases, however, recognize the true test to be whether or not the goods are at the time of the distress in the possession of the tenant in the ordinary way of his trade, regardless of whether the possession is temporary or not. Therefore, unforfeited pledges in the possession of a pawnbroker (*Swire v. Leach*, *supra*), and goods warehoused for an indefinite period at a furniture repository (*Miles v. Furber*, L. R., 8 Q. B. 77; 42 L. J., Q. B. 41), have been held to be privileged.

The exemption only applies if the trader occupies the premises upon which the distress is made. (*Lyons v. Elliott*, 1 Q. B. D. 210; 45 L. J., Q. B. 159.) Thus, goods deposited for sale by auction on premises occupied by an auctioneer are privileged from distress for the rent of those premises (*Adams v. Grane*, 1 Cr. & M. 380; 22 L. J., Ex. 105); and it is immaterial whether the premises are regularly occupied by the auctioneer, or only hired for the particular sale, and whether the occupation is rightful or obtained from a person who had no authority to let, so that the auctioneer is in fact a mere trespasser. (*Brown v. Arundell*, 10 C. B. 54; 20 L. J., C. P. 30; *Williams v. Holmes*, 8 Ex. 861; 22 L. J., Ex. 283.) But calling in an auctioneer to sell on the premises will not protect the

tenant's goods against the landlord, nor will the goods of a stranger removed for the purpose of sale by auction to premises not in the occupation of the auctioneer be privileged from distress. (*Lyons v. Elliott*, 1 Q. B. D. 210; 45 L. J., Q. B. 159.)

Goods at an inn.

The goods and cattle of a guest at an inn are exempt from distress. (*Crosier v. Tomkinson*, 2 Ld. Ken. 439; *Robinson v. Walter*, 3 Bulstr. 269.)

Things in which there can be no valuable property.

Things in which there is no valuable property are exempt from distress. Under this exception come all animals *feræ naturæ*. But animals which have been reclaimed are liable to distress, such as deer kept in a private enclosure for the purpose of sale (*Davies v. Porcell*, Willes, 46), dogs, birds, kept in cages, and the like. (Bullen, 90.)

Perishable articles.

Articles of a perishable nature, such as butchers' meat and the like (*Morley v. Pincombe*, 2 Ex. 101; 18 L. J., Ex. 272), and any other chattels which are incapable of being restored within five days in the same condition as when taken are privileged from distress. (*Simpson v. Hartopp*, 1 Sm. L. C. 463, 9th ed.)

Money.

Money in a bag or chest may be distrained, but not loose money, since the identical pieces could not be ear marked and restored again. (See *Wilson v. Duckett*, 2 Mod. 61.)

Things in present use.

To avoid breaches of the peace (*Storey v. Robinson*, 6 T. R. 138), things in actual use, such as the horse which a man is riding, and the tools with which he is working (*Simpson v. Hartopp*, *supra*), are privileged during the time.

Goods in the custody of the law.

Goods already in the custody of the law, such as property taken damage feasant, or in execution, are exempt. (Co. Litt. 47 a; *Wright v. Dewes*, 1 A. & E. 641. See *ante*, p. 278, as to landlord's right to payment of arrears of rent before removal of goods taken in execution.) But goods seized under a *fi. fa.* are only protected from distress while in the possession of the sheriff; and if he relinquish possession, the possession reverts to the original owner, and the goods may be distrained. (*Blades v. Arundale*, 1 M. & S. 711; *Ex parte Pollen*, *Re Benn Davis*, 55 L. J., Q. B. 217; 54 L. T. 304.) If the sheriff sell the goods the purchaser should remove them as soon as they are capable of delivery, otherwise they will be liable to distress. (*Ib.*)

Cattle of a stranger.

The cattle of a stranger are exempt in certain cases. Cattle on their way to a market, and turned into a field for the night, with the privity of lessor or lessee, are

privileged. (*Poole v. Longueville*, 2 Wms. Saund. 290.) Where the cattle of a stranger break through the tenant's fence, and enter the tenant's land, they are distrainable; but if the fence be defective, and it is one which the tenant is bound to repair, the cattle cannot be distrained unless the owner after notice neglects to remove them. (*Ib.*; 3 Bl. Com. 9.)

In the case of holdings to which the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), applies, in addition to the conditional exemption of cattle at agistment (as to which see *post*, p. 306), there is an absolute exemption from distress in respect of live stock of all kinds the *bonâ fide* property of a person other than the tenant, and which is on the premises solely for breeding purposes; and also in respect of agricultural and other machinery the *bonâ fide* property of a person other than the tenant, and on the premises of the tenant under a *bonâ fide* agreement for the hire or use thereof in the conduct of his business. (Sect. 45.)

Agricultural Holdings Act, 1883.

Breeding stock.

Hired machinery.

Under 51 & 52 Vict. c. 21 (the Law of Distress Amendment Act, 1888), s. 4, any goods of the tenant or his family which would be protected from seizure in execution under sect. 96 of the County Courts Act, 1846, are exempt from distress, but "this enactment shall not extend to any case where the lease, term, or interest of the tenant has expired, and where possession of the premises in respect of which the rent is claimed has been demanded, and where the distress is made not earlier than seven days after such demand." The 147th section of the County Court Consolidation Act, 1888 (51 & 52 Vict. c. 43), is now substituted for the 96th section of the Act of 1846, and the articles exempted are the wearing apparel and bedding of the tenant or his family and the tools and implements of his trade to the value of 5*l*.

Wearing apparel, bedding, and tools.

The goods of a lodger are also privileged under certain conditions. By 34 & 35 Vict. c. 79, it is enacted that, if any superior landlord levies or authorizes to be levied a distress on any furniture, goods or chattels of any lodger for arrears of rent due to such superior landlord by his immediate tenant, such lodger may serve such superior landlord, or the bailiff, or other person employed by him to levy such distress, with a declaration in writing, setting forth that such immediate tenant has no right of property or beneficial interest in the furniture, goods or chattels so

Goods of a lodger.

distrained or threatened to be distrained upon, and that such furniture, goods or chattels are the property or in the lawful possession of such lodger; and also setting forth whether any and what rent is due, and for what period, from such lodger to his immediate landlord; and such lodger may pay to the superior landlord, or to the bailiff or other person employed by him as aforesaid, the rent, if any, so due as last aforesaid, or so much thereof as shall be sufficient to discharge the claim of such superior landlord; and to such declaration shall be annexed a correct inventory, subscribed by the lodger, of the furniture, &c., referred to in the declaration. Making a false declaration shall be deemed a misdemeanor. (Sect. 1.) It has been held that in the event of more distresses than one, the declaration must be served on each occasion, for a declaration gives no protection under the statute unless made after a levy has been made, authorized, or threatened. (*Thicaites v. Wilding*, 12 Q. B. D. 4; 53 L. J., Q. B. 1.) It has also, however, been held that the declaration need not state that the declarant is a lodger, or that no rent is due if such is the fact, silence on the point being equivalent to a statement that no rent is due. (*Ex parte Harris*, 53 L. T. 655; 55 L. J., M. C. 24; 16 Q. B. D. 130.) If the superior landlord, or any bailiff, or other person employed by him, shall, after being served with such declaration and inventory, and after payment or tender of rent, if any, as aforesaid, levy or proceed with a distress on the furniture, &c. of the lodger, such superior landlord, bailiff or other person shall be guilty of an illegal distress [as to the remedies of a lodger for a sale before the expiration of five days, see *Sharp v. Fowle*, 50 L. T. 758; 12 Q. B. D. 385; 53 L. J., Q. B. 309], and the lodger may apply for an order for the restoration of such goods, such application to be heard before a stipendiary magistrate or two justices of the peace, who shall inquire into the truth of such declaration and inventory, and shall make such order for the recovery of the goods or otherwise as to him or them may seem just, and the superior landlord shall also be liable to an action at the suit of the lodger, in which the truth of the declaration and inventory may likewise be inquired into. (Sect. 2.)

The term "lodger" is not defined in the Act, and the existence of the relationship of landlord and lodger is a question of fact (*Ness v. Stephenson*, 9 Q. B. D. 245), but the judge must direct the jury as to what view of the facts

will constitute a lodger. (*Morton v. Palmer*, 9 Q. B. D. 89; 51 L. J., Q. B. 7.) To be a lodger a person must sleep on the premises, not merely use them for business purposes. (*Heawood v. Bone*, 13 Q. B. D. 179; 51 L. T. 125; 32 W. R. 752.) But a person may be an under-tenant and yet a lodger within the meaning of the Act. (*Phillips v. Henson*, 3 C. P. D. 26; 47 L. J., C. P. 273.) Thus, the mere right of exclusive possession, although of a very considerable part of a dwelling-house, and the uncontrolled right of ingress and egress are not inconsistent with the occupier being a lodger within the Act. (*Ib.*) Nor does the fact that the landlord does not, either by himself or his agent, sleep or reside in the house (*Morton v. Palmer*, *supra*), or render any service to his tenant (*Ness v. Stephenson*, 9 Q. B. D. 245), prevent the existence of the relationship of landlord and lodger.

The goods of an ambassador or public minister of any foreign prince or state, and of the domestic servants of such ambassador or minister, are privileged. (7 Anne, c. 12, s. 3; and see *Macartney v. Garbutt*, 24 Q. B. D. 368; 38 W. R. 559.)

Goods of an ambassador.

Rolling stock of a railway company being in a work (*Easton Estate, &c. Co. v. Western Waggon, &c. Co.*, 54 L. T. 735), shall not be liable to distress for rent payable by the tenant of the work, if such rolling stock is not the actual property of the tenant, and have upon it a distinguishing metal plate, brand or other mark conspicuously impressed, sufficiently indicating the actual owner. (35 & 36 Vict. c. 50, s. 3.)

Railway rolling stock.

Under 10 & 11 Vict. c. 15, s. 14, and 34 & 35 Vict. c. 41, s. 18, gas meters and fittings let on hire by the undertakers are not subject to distress. A gas stove let on hire is comprised in the word "fittings." (*Gaslight and Coke Co. v. Hardy*, 17 Q. B. D. 619; 56 L. J., Q. B. 168.)

Gas meters and fittings.

A water company authorized by their special act to supply water by measure may let for hire, to the consumers, meters, instruments, pipes, and apparatus, which are privileged from distress. (26 & 27 Vict. c. 93, s. 14, and see 10 & 11 Vict. c. 17, s. 44.)

Water meters and fittings.

There are other chattels which, though not absolutely privileged, are not to be distrained if there be other sufficient distress. Of this class are "beasts that gain the land," or beasts of the plough, and sheep, and instruments

Chattels conditionally privileged.
Beasts of the plough and sheep.

of husbandry. (51 Hen. 3, stat. 4; *Davies v. Aston*, 1 C. B. 746; 14 L. J., C. P. 228; *Keen v. Priest*, 4 H. & N. 236; 28 L. J., Ex. 157; 7 W. R. 376.) This does not include cart colts and young steers not broken in, or used for harness or the plough. (*Keen v. Priest, supra.*)

Tools of trade
not in use.

In addition to the absolute exemption of tools in use (*ante*, p. 302), and tools to the value with other articles of 5*l.* (*ante*, p. 303), previously noticed, the tools and implements of a man's trade not in actual use are also conditionally exempt. (*Nargatt v. Nias*, E. & E. 439; 28 L. J., Q. B. 143; *Gorton v. Falkner*, 4 T. R. 569; *Fenton v. Logan*, 9 Bing. 676.) If there is a reasonable ground for supposing that without taking these chattels there would not be a sufficient distress, they may be taken, and the sale of them need not be postponed to other goods. (*Jenner v. Yolland*, 6 Price, 3.) So if there are no other things immediately available by sale to raise the arrears of rent. (*Piggott v. Birtles*, 1 M. & W. 441.) And in an early case, it was decided that a distress of implements of trade was good in a case where there were no other chattels on the premises, except the furniture of some lodgers, which the distrainer did not take. (*Roberts v. Jackson*, Peake, Ad. Ca. 36.)

Live stock at
agistment.

Under the Agricultural Holdings Act, 1883, live stock at agistment on a holding to which the Act relates are conditionally exempt from distress. If taken in to be fed at a fair price [not necessarily money; it may be an equivalent in barter, *London, &c. Banking Co. v. Belton*, 54 L. J., Q. B. 568; 15 Q. B. D. 457] agreed to be paid to the tenant, such stock shall not be distrainable when there is other sufficient distress to be found; and, when distrainable, it shall only be for the price agreed to be paid for the feeding, or the balance then unpaid of such price. The owner may at any time before sale redeem such stock upon paying the amount then due for the feeding. (46 & 47 Vict. c. 61, s. 45.) Where cattle were on land under an agreement that the owner of them was to have "the exclusive right of eating the grass of a certain field for four weeks," the agreement was held to be not one of "agistment," but a letting of an interest in the land. (*Masters v. Green*, 20 Q. B. D. 807; 59 L. T. 476.)

Things dis-
trainable by
statute.

On the other hand, growing crops and other farm produce which were not distrainable at common law are made so by statute.

Cocks and sheaves of corn were not distrainable before the statute next mentioned, because they could not be restored in the same plight and condition. (*Wilson v. Duckett*, 2 Mod. 61; *Simpson v. Hartopp*, per Willes, C. J.) But it was enacted by 2 Wm. & M., sess. 1, c. 5, s. 3, that any person having rent in arrear, and due upon any demise, may distrain sheaves or cocks of corn, or corn loose or in the straw, or hay in any barn or granary or upon any hovel, stack, or rick, or otherwise upon any part of the land charged with the rent, and detain the same in the place where it shall be found, as a distress until replevied or sold. Five days are to be allowed to the tenant for replevying before the same is sold.

Corn, straw
and hay.

Growing crops, like fixtures, being part of the thing demised, were exempt from distress at common law. But by 11 Geo. 2, c. 19, ss. 8 and 9, the landlord may take and seize as a distress for arrears of rent all sorts of corn and grass, hops, roots, fruits, pulse or other product whatsoever growing upon any part of the estate demised, and the same may cut, gather, make, cure, carry and lay up, *when ripe*, in the barns or other proper places on the premises; and if there should be no barn or proper place on the premises, then in any other barn or proper place which he shall procure as near as may be to the premises; and in convenient time appraise, sell or otherwise dispose of the same towards satisfaction of the rent and of the charges of such distress, appraisement and sale; the appraisement thereof to be taken when cut, gathered, cured and made, and not before; notice of the place where such distress shall be lodged shall, within one week after lodging thereof, be given to the tenant or left at the last place of his abode. If the tenant shall pay or tender the arrears of rent and costs of distress before the corn, &c. be cut, the distress shall cease and the corn, &c. be delivered up. This statute does not give the right to seize young trees, shrubs, and plants growing in a nursery garden, "other products" being confined to things *ejusdem generis* with corn, grass, &c. (*Clark v. Gaskarth*, 8 Taunt. 431); neither does it compel the landlord to resort to growing crops before distraining things conditionally privileged. (*Piggott v. Birtles*, 1 M. & W. 451.) Although growing crops are not to be sold until ripe (*Owen v. Legh*, 3 B. & Ald. 470), yet where the jury find that no damage has been sustained by the premature sale the tenant is not

Growing
crops.

entitled to a verdict even for nominal damages. (*Rodgers v. Parker*, 18 C. B. 112; 25 L. J., C. P. 220.)

Growing crops sold under an execution, liable to distress for rent accruing after seizure and sale.

Formerly, a growing crop sold under an execution could not be distrained for rent, unless the purchaser allowed it to remain on the ground for an unreasonable time after it was ripe. (*Peacock v. Purvis*, 2 B. & B. 362.) Now, however, in case all or any part of the growing crops of a tenant of any farm or lands shall be seized and sold by any sheriff or other officer by virtue of any writ of execution, such crops, so long as the same shall remain on the farm or lands, shall, *in default of sufficient distress of the goods and chattels of the tenant*, be liable to the rent which may accrue and become due to the landlord after any such seizure and sale, and to the remedies by distress for recovery of such rent; and that notwithstanding any bargain, sale or assignment which may have been made or executed of such growing crops by any such sheriff or other officer. (14 & 15 Vict. c. 25, s. 2.)

Farm produce sold by sheriff subject to agreement to consume it on the land.

The 56 Geo. 3, c. 50, enacts that no sheriff or other officer shall, by virtue of any process of any court of law, carry off, or sell, or dispose of, for the purpose of being carried off from any lands let to farm, any straw, threshed or unthreshed, or any straw of crops growing, or any chaff, colder, or any turnips, or any manure, compost, ashes, or seaweed in any case whatsoever; nor any hay, grass, or grasses, whether natural or artificial, nor any tares, or vetches, nor any roots, or vegetables, being produce of such lands, in any case where, according to any covenant or written agreement, entered into and made for the benefit of the owner or landlord of any farm, such hay, grass, or grasses, tares and vetches, roots, or vegetables ought not to be taken off, or withholden from, such lands, or which, by the tenor or effect of such covenants or agreements, ought to be used or expended thereon, and of which covenants or agreements such sheriff or other officer shall have received a written notice before he shall have proceeded to sale. (Sect. 1.) Any crops or produce of this description may be sold by the sheriff, subject to an undertaking to expend them on the land according to the custom of the country, or according to the terms of any covenant or written agreement which has been entered into by the tenant. (Sect. 3.) Where any purchaser of such crops or produce shall have agreed with the sheriff for the expenditure thereof on the lands, it shall not be lawful for the

Exempt from distress.

landlord of such lands to distrain for rent on any corn, hay, straw, or other produce thereof which, at the time of such sale and the execution of such agreement entered into under the provisions of the Act, shall have been severed from the soil and sold subject to such agreement, nor on any turnips, whether drawn or growing [as to growing turnips the Act is qualified by the later statute 14 & 15 Vict. c. 25, s. 2, *ante*, p. 308], if sold according to the provisions of the Act; nor on any horses, sheep, or other cattle, nor on any beast whatsoever, nor on any waggons, carts, or other implements of husbandry, which any person shall employ, keep or use on such lands for the purpose of threshing out, carrying, or consuming any such corn, hay, straw, turnips, or other produce under the provisions of the Act and the agreement directed to be entered into between the sheriff and the purchaser of such crops and produce. (Sect. 6.)

The Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), provides that in the distribution of the property of a bankrupt, or the assets of a company being wound up, certain rates and taxes, the wages or salary of any clerk or servant, and the wages of any labourer or workman shall be paid in priority to all other debts (sect. 1, sub-s. 1), and enacts that in the event of a landlord or other person distraining or having distrained on any goods or effects of a bankrupt, or a company being wound up within three months next before the date of the receiving order or the winding-up order respectively, the debts to which priority is so given shall be a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof. But for money paid under such charge the landlord is entitled to stand in the place of the person to whom the payment is made. (Sect. 1, sub-s. 4.)

Distress postponed to preferential payments in case of bankruptcy.

Where a receiver appointed by the Court is in possession of the premises the landlord, before distraining, should apply to the Court for leave. (*Sutton v. Rees*, 32 L. J., Ch. 437; *Russell v. East Anglian Rail. Co.*, 3 M. & G. 118.) So where the premises are in the possession of a provisional liquidator. (*Re Dry Docks Corporation of London*, 39 Ch. D. 306; 58 L. J., Ch. 33.) But no leave is necessary in the case of a receiver in bankruptcy. (*Ex parte Till*, *Re Mayhew*, 42 L. J., Bkcy. 84; L. R., 16 Eq. 97.) And if a landlord is in possession before a receiver is appointed, he need not apply for leave to proceed with his

Distress when premises in possession of a receiver.

Distress upon
goods of a
company be-
ing wound up.

distress. (*Engel v. South Metropolitan, &c. Bottling Co.*, W. N. (1891) 31; *Evelyn v. Lewis*, 3 Hare, 475.)

Where a company is being wound up by the Court or subject to the supervision of the Court, any distress put in force against the estate or effects of the company after the commencement of the winding up shall be void. (25 & 26 Vict. c. 89, s. 163.) The Court may, under sect. 87 of the Act, give leave to proceed with a distress if it think fit. (*Re Exhall Coal Mining Co.*, 33 L. J., Ch. 596, n.; 4 De G., J. & S. 377.) If the landlord is a legal creditor of the company in respect of arrears of rent, leave will not be given to distrain for rent which has accrued due before the winding up; as to such the landlord must prove in the winding up. (*Re North Yorkshire Iron Co.*, 7 Ch. D. 661; 47 L. J., Ch. 333; *Re Coal Consumers' Association*, 4 Ch. D. 625; 46 L. J., Ch. 501; *Re Bridgwater Engineering Co.*, 12 Ch. D. 181; 48 L. J., Ch. 389; *Re South Kensington Stores*, 17 Ch. D. 161; 50 L. J., Ch. 446; *Re Traders' North Staffordshire Carrying Co.*, L. R., 19 Eq. 60; 44 L. J., Ch. 172; *Thomas v. Patent Lionite Co.*, 17 Ch. D. 250; 50 L. J., Ch. 544; *Re Brown, Ex parte Roberts and Wright*, 18 Ch. D. 649; 50 L. J., Ch. 738.) As to rent accrued after the commencement of the winding up, to entitle the landlord to leave to distrain, he must show either that it is inequitable for the company to insist on sect. 163, or that the rent ought to be paid as part of the costs of the winding up. (*Re Lancashire Cotton Spinning Co.*, 35 Ch. D. 656; 56 L. J., Ch. 761.) Thus, leave has been refused where upon the evidence it was considered the liquidator had retained possession of the premises for the benefit of the landlord and the company, and not for the purposes of the liquidation (*Re Bridgwater Engineering Co.*, *supra*; *Re Oak Pits Colliery Co.*, 21 Ch. D. 322; 51 L. J., Ch. 768, in which Lindley, L. J., reviewed all the authorities); but granted where the liquidator has retained possession merely for the convenience of winding up, or for the purpose of disposing of the property to advantage. (*Re Lundy Granite Co.*, L. R., 6 Ch. 462; 40 L. J., Ch. 588; *Re North Yorkshire Iron Co.*, *supra*; *Re South Kensington Stores*, 50 L. J., Ch. 446; 17 Ch. D. 161; *Re Oak Pits Colliery Co.*, *supra*; and see *Re National Arms, &c. Co.*, 28 Ch. D. 474; 33 W. R. 585; 54 L. J., Ch. 673.) As rent now accrues due *de die in diem*, when a distress is permitted in respect of that which accrues after

the commencement of the winding up, the rent of the current half-year or quarter will be apportioned. (*Re South Kensington Stores, supra.*) Where the lessor has a power of re-entry for rent in arrear, he may insist upon payment in full of accrued rent as the condition upon which the liquidator is to continue in possession, and in default of payment may distrain. (*Re Silkstone and Dods-worth Coal Co.*, 50 L. J., Ch. 444; 17 Ch. D. 158.) And the Court has only power to restrain a distress even for rent in arrear at the commencement of the winding up, where the landlord is a legal creditor of the company for the rent, that is to say, where the company is his tenant, and not merely an underlessee or person in possession by leave of the tenant. The Court has no power to restrain a distress where the company's goods are upon the tenant's premises, and are there taken in distress (*Re Lundy Granite Co., supra*; *Re Traders' North Staffordshire Carrying Co.*, 44 L. J., Ch. 172; L. R., 19 Eq. 60; *Re Regent United Service Stores*, 47 L. J., Ch. 677; 8 Ch. D. 616); nor where the effects distrained upon are not in fact the property of the company, as in the case of goods mortgaged to debenture holders for more than their value. (*Re New City Constitutional Club*, 34 Ch. D. 646; 56 L. J., Ch. 332.) Nor will the landlord's right be taken away by an offer by the liquidator to allow the arrears to be proved in the winding up (*Re Regent United Service Stores, supra*); nor by the landlord having taken a promissory note from the company for the arrears. (*Re Carriage Co-operative Supply Association, Ex parte Clemence*, 23 Ch. D. 154; 48 L. T. 308; 52 L. J., Ch. 472.)

Where the company being wound up is the lessee of property for an unexpired term, the landlord's claim in respect of future rent is a claim of a certain and ascertained amount (25 & 26 Vict. c. 89, s. 158); and if the company is solvent the landlord is entitled to have set apart to indemnify him such a sum as by means of principal and interest will cover all future payments of rent during the term. (*Oppenheimer v. British and Foreign Exchange, &c. Bank*, 46 L. J., Ch. 882; 6 Ch. D. 744; *Re Haytor Granite Co.*, L. R., 1 Ch. 77; 35 L. J., Ch. 154.)

SECT. 6.—*Where Distress may be made.*

Distress to
be made on
demised
premises.

By agreement the tenant may give the landlord power to distrain upon other lands of the tenant than those out of which the rent issues, and such an agreement will bind both the tenant and his assigns. (*Daniel v. Stepney*, L. R., 9 Ex. 185; 22 W. R. 662.) But independently of contract the general rule is that a distress can only be made of goods found upon some part of the premises out of which the rent issues. Thus, where there was a demise of a wharf on the river Thames, but not of any soil of the river, it was held that the landlord was not entitled to distrain barges lying in the river and fastened to the demised premises by ropes, as they were not upon the premises. (*Capel v. Buszard*, 6 Bing. 150; but see *Gillingham v. Gwyer*, 16 L. T., N. S. 640.) But upon any part of the demised premises a distress may be taken for the whole rent, since the whole is deemed to issue out of every part of the land. (*Hargrave v. Shewin*, 6 B. & C. 34.) If several parcels of land are let to the same person under separate demises, and rent is due upon more than one, a joint distress cannot be taken. (*Rogers v. Birkmire*, 2 Stra. 1040.) A distress cannot be taken "on the king's highway nor in the common street." (52 Hen. 3, c. 15.)

To the general rule above stated there are three exceptions:—

Cattle on
common.

1. A landlord may distrain, for arrears of rent, the cattle or stock of his tenant feeding upon any common appendant or appurtenant, or in any way belonging to the premises demised. (11 Geo. 2, c. 19, s. 8.)

Cattle driven
off to avoid
distress.

2. If the landlord coming to distrain see the tenant's cattle on the premises, and the tenant, to prevent the distress, drive them off the premises, the landlord may make fresh pursuit and seize them in the highway or in any other place off the lands demised. But if the cattle of their own accord go out of the lands demised or into the highway within his view he cannot pursue them; neither can he if they be driven off the lands for any other purpose than to avoid distress. (Co. Litt. 161 a.)

Fraudulent
removal.

3. Where the tenant of any messuages, lands, tenements or hereditaments in respect of which any rent is reserved shall fraudulently or clandestinely convey away or carry off or from such premises his goods or chattels to prevent the landlord from distraining the same for arrears

of rent so reserved, the landlord or any person by him empowered may, *within the space of thirty days* next ensuing the removal of the goods, take and seize them as a distress wherever they may be found (11 Geo. 2, c. 19, s. 1): provided, however, that they have not before such seizure been sold *bond fide* and for a valuable consideration. (Sect. 2.) If it be necessary to break open any door in order to seize them, the landlord in the daytime may do so, first calling to his assistance the constable or other peace officer of the hundred, parish or place where the goods are concealed, and, in the case of a dwelling-house, oath being first made before a justice of the peace of a reasonable ground to suspect that such goods are therein. (Sect. 7.)

The statute only applies where the removal takes place on or after the day when the rent became due (*Rand v. Vaughan*, 1 Bing. N. C. 767; *Dibble v. Bowcater*, 2 E. & B. 564; 22 L. J., Q. B. 396); where the goods are those of the tenant, and not of a stranger or lodger (*Thornton v. Adams*, 5 M. & S. 38; *Fletcher v. Marillier*, 9 A. & E. 457), or mortgagee of the tenant (*Tomlinson v. Consolidated Credit, &c. Corporation*, 24 Q. B. D. 135; 38 W. R. 118); and where no sufficient distress remains on the premises after the removal, of which the onus of proof lies on the landlord. (*Parry v. Duncan*, 7 Bing. 243; M. & M. 533; but see *Gillam v. Arkwright*, 16 L. T. 88.) The statute, however, applies where the removal, though not clandestine, is fraudulent, which is a question for the jury. (*Opperman v. Smith*, 4 D. & R. 33.) The landlord must show that the goods were removed with a view to elude a distress (*Parry v. Duncan*, *supra*); and even if the tenant admit that, it would seem to be still a question for the jury whether the removal was fraudulent or not within the statute. (*John v. Jenkins*, 1 Cr. & M. 227.) It is not necessary to show that a distress was contemplated at the time of removal. (*Stanley v. Wharton*, 10 Price, 138.)

Cases to which
11 Geo. 2,
c. 19, applies.

To avail himself of the statute, the landlord must have the right to distrain, either at common law, or under 8 Anne, c. 14, ss. 6, 7. (*Gray v. Stait*, 11 Q. B. D. 668; 52 L. J., Q. B. 412.) If the landlord have parted with his reversion, he cannot distrain under the statute. (*Ashmore v. Hardy*, 7 C. & P. 501.) Neither can he follow the goods after the tenancy has determined and the tenant has given up possession of the premises. (*Gray v. Stait*, *supra*.) Nor

in any case can he distrain the goods until the rent is actually in arrear. (*Dibble v. Bowater*, 2 E. & B. 564.)

By the same statute it is further provided, that if the tenant shall fraudulently remove his goods as aforesaid, or if any person shall wilfully and knowingly aid or assist such tenant in such fraudulent conveying away of goods, or in concealing the same, all and every the person so offending shall forfeit and pay to the landlord double the value of the goods by him carried off or concealed, to be recovered by action. (11 Geo. 2, c. 19, s. 3.) Where the value of the goods so removed does not exceed 50*l.*, the landlord may take summary proceedings for recovering double value, by complaint before two justices of the peace. (Sect. 4.) This latter remedy is alternative, and does not prevent the landlord proceeding by action though the value of the goods be under 50*l.* (*Bromley v. Holden*, M. & M. 175), and although he has made complaint before the magistrates, which he afterwards abandoned. (*Horsefall v. Davy*, 1 Stark. 169.) If a creditor, with the consent of the debtor, remove goods from the premises in payment of his debt, although with knowledge of the rent being in arrear, he does not incur the penalty. (*Bach v. Meats*, 5 M. & S. 200; *Tomlinson v. Consolidated Credit, &c. Corporation*, 24 Q. B. D. 135.)

The action is a penal one, and the plaintiff is not entitled to deliver interrogatories to the defendant. (*Jones v. Jones*, 22 Q. B. D. 425; 58 L. J., Q. B. 178; *Hobbs v. Hudson*, 25 Q. B. D. 232; 59 L. J., Q. B. 562.)

SECT. 7.—*By whom and how levied.*

Landlord or
bailiff may
levy.

The landlord may distrain personally or by his agent or bailiff. It is usual, but, except in the case of a corporation aggregate, not necessary, that the bailiff have a written authority. (*Cary v. Matthews*, 1 Salk. 191; *Randle v. Deane*, 2 Lutw. 1496.) Neither is it necessary even that the bailiff have an antecedent authority; it is sufficient if the landlord recognize and adopt his act. (*Trevillian v. Pine*, 11 Mod. 112.) When a warrant to distrain is given to one man, it cannot be executed by another person not therein named. (*Symonds v. Kurtz*, 61 L. T. 559.)

No person shall act as a bailiff to levy any distress for rent, unless he shall be authorized to act as a bailiff by a certificate in writing under the hand of a county court judge; and such certificate may be general or apply to a particular distress or distresses. If any person not holding a certificate under this section shall levy a distress contrary to the provisions of this Act, the person so levying, and any person who has authorized him so to levy, shall be deemed to have committed a trespass. (51 & 52 Vict. c. 21, s. 7.) The power of a county court judge is not limited to appointing bailiffs to act within his own district, but he may grant certificates authorizing the bailiff to levy in any part of England or Wales. (*Ex parte Sergeant, Re Sanders*, 54 L. J., Q. B. 331; 52 L. T. 516.) There is nothing to prevent an uncertificated landlord personally levying (*Jackson v. Bennan*, 37 Sol. J. 282), and then leaving to his uncertificated bailiff the conduct of the distress from levy to sale. But the managing director of a company is not in the position of landlord to the tenants of the company, and unless acting under a certificate as bailiff will be guilty of trespass in distraining. (*Hogarth v. Jennings*, 66 L. T. 821; [1892] 1 Q. B. 907; 61 L. J., Q. B. 601.)

Bailiff must
be a certified
one.

The person distraining may open an outer door in the usual manner of access, as by lifting a latch, turning a key, or drawing back a bolt, or even by pulling out a movable staple, when that is the usual mode of entry. (*Ryan v. Shilcock*, 21 L. J., Ex. 55; 7 Ex. 72); but if the door is fastened, it cannot, except in the case of a fraudulent removal (*ante*, p. 312), be broken open. (*Semayne's case*, 1 Sm. L. C. 115, 9th ed.) This immunity extends to the outer door of any building whatever, including an outhouse within the curtilage (*The American Concentrated Meat Co. v. Hendry*, W. N. (1893) 82 (C. A.)), as well as a barn, stable, or outhouse not within the curtilage of the dwelling-house. (*Brown v. Glenn*, 16 Q. B. 254; 20 L. J., Q. B. 205.) But if the outer door is open, an inner door or lock may be broken open (*Browning v. Dann*, Bull. N. P. 81); and where an entry has once been made, the distrainer, if forcibly expelled, may procure the assistance of a peace officer and break open the outer door to renew the distress, even after the lapse of three weeks. (*Eldridge v. Stacey*, 15 C. B., N. S. 458; 12 W. R. 51.) But where a person has merely got his foot and arm between the door and the

Entry.

lintel, or by putting a stick or other article between the door and lintel, has prevented the door being closed, that is not such an entry as will entitle him afterwards to break open a door or window to distrain. (*Boyd v. Profaze*, 16 L. T. 431.)

A forcible re-entry may be made where the man in possession voluntarily goes away, not with the intention of abandoning the distress, but for a temporary purpose, and on his return finds the door locked. (*Bannister v. Hyde*, 2 E. & E. 627; 29 L. J., Q. B. 141.) But it is always a question of fact whether or not there has been an abandonment, and in an early case it was held that the landlord was not entitled to re-enter forcibly after the lapse of several days. (*Russell v. Rider*, 6 C. & P. 416.) Entry may be made through an open window, but not through a window which is shut, although not fastened. (*Nash v. Lucas*, L. R., 2 Q. B. 590; *Hancock v. Austin*, 32 L. J., C. P. 252; 14 C. B., N. S. 634.) If the window be at all open it may be further opened to enable an entry to be made. (*Crabtree v. Robinson*, 15 Q. B. D. 312; 54 L. J., C. B. 544.) The person distraining may climb over a fence to gain access by an open door. (*Eldridge v. Stacey*, *supra*—though there is an authority to the contrary—*Scott v. Buckley*, 16 L. T. 573.) He may gain access by any means which does not involve committing a trespass. (*Gould v. Bradstock*, 4 Taunt. 562.)

Seizure.

To complete the distress a seizure is necessary. This is usually made by taking hold of some personal chattel, and declaring that it is taken as a distress in the name of all the goods, or so much thereof as may be necessary to satisfy the rent. (*Dod v. Monger*, 6 Mod. 215.) But any act or words expressive of an intention to distrain will suffice (*Hutchins v. Scott*, 2 M. & W. 809); thus, refusing to allow goods to be removed until the rent be paid (*Wood v. Nunn*, 5 Bing. 10; *Cramer v. Mott*, 39 L. J., Q. B. 172; L. R., 5 Q. B. 357); and walking round the premises and leaving a written notice that certain goods lying there are distrained, and will be appraised and sold if not replevied, and going away without leaving anyone in possession (*Swann v. Falmouth*, 8 B. & C. 456), have been held sufficient to constitute a seizure.

Notice of distress.

After the seizure an inventory should be made of the goods intended to be comprised in the distress. A copy of this, with a notice (usually written at the foot of the

inventory) of the fact of the distress having been made, with the cause of such taking, must be served on the tenant personally, or left at the chief mansion-house or other most notorious place on the premises charged with the rent distrained for. (2 Wm. & M. sess. 1, c. 5, s. 2.) This notice must be in writing (*Wilson v. Nightingale*, 8 Q. B. 1034), and should state the amount of rent due, though the landlord is not bound by that statement, for the tenant is presumed to know the amount of his arrears, and merely distraining and selling for more rent than is due will not support an action if the goods taken and sold are not more than sufficient to satisfy the actual arrears. (*Tancred v. Leyland*, 16 Q. B. 669; 20 L. J., Q. B. 316; *Stevenson v. Neicnham*, 13 C. B. 285; 22 L. J., C. P. 110.) The notice should distinctly specify the goods distrained, for the legislature intended that the tenant should be informed what particular things were taken; and though a notice naming certain articles and adding "any other goods and effects that may be found in and about the said premises" was held sufficient, where the intention was to distrain everything (*Wakeman v. Lindsey*, 14 Q. B. 625; 19 L. J., Q. B. 166), the words "and all other goods *that may be required* in order to satisfy the above rent, together with all necessary expenses," after a specific enumeration, were held too vague to include anything beyond the articles enumerated. (*Kerby v. Harding*, 6 Ex. 234; 20 L. J., Ex. 163.) The notice should state the time when the goods will be sold unless replevied, or the rent and charges satisfied, and, if the distress be impounded off the premises, the place where impounded. It need not state when the rent became due (*Moss v. Gallimore*, 1 Doug. 279); and omitting to state that the goods are impounded will not make the impounding void. (*Tenant v. Field*, 8 E. & B. 336; 27 L. J., Q. B. 33.) The want of notice does not render the distress invalid, but it makes it irregular to sell. (*Trent v. Hunt*, 22 L. J., Ex. 318.)

SECT. 8.—*How dealt with.*

To enable the tenant to replevy, it was provided by **Impounding.** 2 Wm. & M. sess. 1, c. 5, s. 2, that the goods distrained should not be sold for at least five days after the seizure.

By the Act, 51 & 52 Vict. c. 21, s. 6, the period of five days given by the earlier statute shall be extended to fifteen days, if the tenant or owner of the goods make a written request for such extended time, and give security for extra costs. In the meantime it is the landlord's duty to keep the goods safely, and for this purpose to impound them. They may generally be either removed to a pound off the premises or impounded on the premises. The exceptions to this general rule are, sheaves or cocks of corn, or corn loose or in the straw or hay, in which case a removal from the premises is prohibited (2 W. & M. sess. 1, c. 5), and growing crops which can only be removed when ripe and cut, and there is no proper place on the premises wherein they can be placed. (11 Geo. 2, c. 19, s. 8.) And in that case notice of the place where the things distrained shall be deposited, shall, within one week after the depositing thereof in such place, be given to the tenant or left at his last place of abode. (Sect. 9.) Goods impounded on the premises are not in the "order and disposition" of the tenant in the event of his bankruptcy. (*Sacker v. Chidley*, 13 W. R. 690.)

Pound must be sufficient to secure the safety of the distress.

A pound is either overt (open overhead) or covert (close overhead). Cattle may be impounded in a pound overt, but furniture and goods liable to be damaged by wet or weather, or be stolen, must be placed in a house or other pound covert. (Co. Litt. 47 h.) As impounding is for safe custody, the landlord is bound at his peril to take care that the place in which he impounds the distress (even though it be in a public pound) is in a fit and proper state, and he is liable for the loss of or injury to the distress if it is not. (*Bignell v. Clark*, 29 L. J., Ex. 257; *Wilder v. Speer*, 8 A. & E. 547.) If cattle are tied in the pound and strangle themselves, the landlord will be liable; but he is not liable if they die by the act of God, and in that case he may distrain again. (*Vasper v. Eddowes*, 1 Ld. Raym. 719; Bac. Abr. "Distress" (D).)

Distress not to be used.

The landlord acquires no property in the distress, and it is an abuse of his power if he use the distress, except in the case of milch cows, which may be milked. If the landlord abuse a distress by working it the owner may interfere to prevent it, without being liable for poundbreach or rescue. (*Smith v. Wright*, 6 H. & N. 821; 30 L. J., Ex. 313.)

Impounding

Formerly a distress could only be impounded on the

premises with the consent of the tenant ; but by 11 Geo. 2, c. 19, s. 10, it was enacted that it shall be lawful for any person lawfully taking any distress for any kind of rent to impound or otherwise secure the distress so made, of what nature or kind soever it may be, in such place or on such part of the premises chargeable with the rent as shall be most fit and convenient for the impounding and securing such distress. And now distresses are usually impounded on the premises. The landlord ought not to deprive the tenant of the whole house, but should put all the goods seized into one or more rooms and lock them up, unless the tenant consent to their being left in their ordinary position, of which consent very slight evidence will be sufficient. (*Washborn v. Black*, 11 East, 405, n.; *Woods v. Durrant*, 16 M. & W. 149.) The whole of the premises cannot be locked up; the goods ought rather to be removed. (*Smith v. Ashforth*, 29 L. J., Ex. 259.) Cattle may be impounded in the open field by properly securing the gate (*Castleman v. Hicks*, 1 Car. & M. 266); and where the landlord's agent went into a field where the tenant's cattle were feeding, and placed his hand upon one of the beasts, saying he distrained the whole for the rent due, counted them, and went away, and next morning left with the tenant a notice stating that he had distrained the cattle thereunder mentioned, and had impounded them on the premises, this was held to constitute an impounding. (*Thomas v. Harries*, 1 M. & Gr. 695.)

It seems doubtful whether, after impounding the goods off the premises, there is any right to bring them again on to the premises for the purpose of impounding. (*Smith v. Wright*, 30 L. J., Ex. 313, *per* Bramwell, B.)

By the common law the landlord in removing the distress might have impounded it where he liked. But by 1 & 2 Ph. & M. c. 12, s. 1, no distress of cattle shall be driven out of the hundred, rape, wapentake or lathe where taken, except to a pound overt within the same shire, not above three miles distant; and no cattle or other goods distrained shall be impounded in several places on pain of a penalty of 5*l.* and treble damages. If for an entire rent out of contiguous lands in different counties the landlord distrain cattle in both counties, he may drive them all into one county; though it is otherwise if the two counties do not join. (*Walter v. Rumbal*, 1 Ld. Raym. 53.)

Cattle not to be driven out of the hundred.

By 12 & 13 Vict. c. 92, every person who impounds or Liability of

person impounding for food and water of animals.

causes to be impounded in any pound or receptacle of the like nature any animal, is bound under a penalty of twenty shillings to provide and supply during the confinement a sufficient quantity of fit and wholesome food and water to such animal. (Sect. 5; *Dargan v. Davies*, 46 L. J., M. C. 122; 2 Q. B. D. 118.) If the animal continues to be confined without fit and sufficient food for more than twelve successive hours, any person may from time to time, as often as necessary, enter into the pound and supply the animal with fit and sufficient food and water without being liable to any action or proceeding by reason of the entry; the reasonable cost of the food and water is to be paid by the owner before it is removed to the person supplying it, and is recoverable as a penalty under the Act by summary proceedings. (Sect. 6.) It was doubtful whether this Act gave any remedy to the person impounding for the recovery of compensation for food and water provided, and moreover it gave no power to sell the animal; and therefore 17 & 18 Vict. c. 60, s. 1, provides that every person who impounds or confines any animal, and supplies it with food and water as in 12 & 13 Vict. c. 92 mentioned, shall be entitled to recover from the owner not exceeding double the value of the food and water in the manner provided by that Act for the recovery of penalties; and every person who supplies such food and water may, if he think fit, instead of proceeding for the recovery of the value of it, sell any animal impounded openly at any public market (after seven clear days from the impounding, and after having given three days' public printed notice) for the most money that can be got for the same, and may apply the produce in discharge of the value of the food and water, and the expenses of the sale, rendering the overplus to the owner. When more animals than one are impounded, there may be a sale from time to time of so many as may be necessary. (*Layton v. Hurry*, 8 Q. B. 811.)

SECT. 9.—*How disposed of.*

How distress must be disposed of.

Formerly a distress could not be sold, but only retained as a pledge. Neither is it now regular to sell unless the notice hereinbefore mentioned (*ante*, p. 316) has been given. But it was provided by 2 Wm. & M. sess. 1, c. 5, s. 2, that

such notice having been given, and the tenant failing within five days to replevy, then after such distress and notice aforesaid and expiration of the said five days, the person distraining might cause the goods and chattels to be appraised by two appraisers, and after such appraisement might lawfully sell the goods and chattels so distrained for the best price that could be gotten for the same towards satisfaction of the rent for which the said goods and chattels should be distrained, and of the charges of such distress, appraisement and sale, leaving the overplus, if any, in the hands of the sheriff, under-sheriff or constable for the owner's use.

The Law of Distress Amendment Act, 1888, has made the following modifications in the earlier statute, viz., the period of five days allowed to replevy is extended to not more than fifteen days, if the tenant or owner of the goods make a request in writing in that behalf to the landlord or other person levying the distress, and give security for any additional costs occasioned by such extension of time; but the landlord or person levying the distress may, at the written request, or with the written consent, of the tenant or such owner as aforesaid, sell the goods and chattels distrained, or part of them, at any time before the expiration of such extended period as aforesaid. (51 & 52 Vict. c. 21, s. 6.)

Fifteen days
to replevy.

And so much of the earlier Act as requires appraisement before sale of goods distrained is repealed, except in cases where the tenant or owner of the goods and chattels, by writing, requires such appraisement to be made, and the landlord or other person levying a distress may, except as aforesaid, sell the goods and chattels distrained without causing them to be previously appraised; the costs and expenses of appraisement, when required by the tenant or owner, shall be borne and paid by him. (Sect. 5.)

Appraisement
abolished
except where
required in
writing.

The statute 2 Wm. & M. sess. 1, c. 5, also required that the sheriff or under-sheriff, or constable, should be aiding and assisting at the distress, and that the two appraisers should be sworn, but this portion is also repealed. (35 & 36 Vict. c. 92, s. 13.) Where an appraisement is still requisite, it is not necessary that the appraisers should be professional ones, but they must be reasonably competent. (*Roden v. Eyton*, 6 C. B. 427.) Except by the consent of the tenant there must be two, whatever the amount of rent distrained for, notwithstanding the Ap-

Mode of
appraisement
where neces-
sary.

pendix II. to the Distress for Rent Rules, 1888, like the schedule to the statute 57 Geo. 3, c. 93, seems to contemplate an appraisement by one where it is under 20%. (*Allen v. Flicker*, 10 A. & E. 640.) Neither the landlord nor his bailiff or person actually making the distress can act as one of the appraisers. (*Lyon v. Weldon*, 2 Bing. 334; *Westwood v. Cowne*, 1 Stark. 172.)

Stamp on appraisement.

The appraisement must be properly stamped. (See 54 & 55 Vict. c. 39, s. 24, and schedule.)

Sale.

The Law of Distress Amendment Act, 1888, provides that for the purposes of sale the goods and chattels distrained shall, at the written request of the tenant or owner of the goods, be removed to a public auction room or other fit place specified in such request, and there sold. The costs attending the removal and any damage to the chattels arising therefrom are to be borne by the party requesting the removal. (51 & 52 Vict. c. 21, s. 5.) The section does not in terms provide that the goods so removed shall be sold by auction, but the landlord would be ill-advised to sell otherwise, except at the request of the tenant.

Subject to a request for removal, when the distress is impounded on the premises, it may be sold there. (11 Geo. 2, c. 19, s. 10.) The landlord cannot sell before the expiration of the five (or, where the tenant is entitled to such extended time, fifteen) days, but he is not bound to sell immediately the time allowed for replevin has expired. (*Philpott v. Lehain*, 35 L. T. 855.) He is allowed a reasonable time afterwards to sell and dispose of the goods. (*Pitt v. Shew*, 4 B. & Ald. 208.) What is a reasonable time is a question for a jury, as every case must depend upon its own particular circumstances. (*Ib.*) Corn loose or in sheaves, and hay, however, must be sold immediately upon the expiration of the five (or, as the case may be, fifteen) days, and growing crops must be sold when cut and placed in barns. (*Piggott v. Birtles*, 1 M. & W. 448.) In other cases the landlord must not keep the distress upon the premises after a reasonable time has elapsed, but must remove it (unless the tenant consent to its remaining), otherwise he becomes a trespasser. (*Griffin v. Scott*, 2 Ld. Raym. 1424; *Winterbourne v. Morgan*, 11 East, 395.) Such a consent does not require to be stamped. (*Fishwick v. Milnes*, 4 Ex. 825; 19 L. J., Ex. 153.)

The five or fifteen days must be the given number of clear days computed exclusive of the day of distress and

the day of sale. (*Robinson v. Waddington*, 13 Q. B. 753; 18 L. J., Q. B. 250.) But, in an action for selling the goods before the given number of days have elapsed, the tenant can only recover if he has sustained actual damage. (*Lucas v. Tarleton*, 3 H. & N. 116; 27 L. J., Ex. 246.) A third person, however, whose goods are conditionally exempt, is entitled to recover their full value as damages for selling before the expiration of the given number of days. (*Sharp v. Fowle*, 12 Q. B. D. 385; 53 L. J., Q. B. 309.)

Before selling, the office of the county court of the district should be searched to see if the goods have been replevied.

The goods must be sold for the best price that can be obtained for them. It was formerly held, that if sold at the appraised value, they were presumed to have been sold at the best price (*Walter v. Rumbal*, 1 Ld. Raym. 53); but the ground of decision was the reliance the law placed upon the appraisers being sworn, and inasmuch as the appraisers are no longer sworn, the appraisement is only *prima facie* evidence of the value. (*Cook v. Corbett*, 24 W. R. 181.) Very often the goods are bought by the appraisers or one of them at their own valuation; this course, however, should only be adopted when the value of the goods is small. The landlord cannot take the goods at their appraised value. (*King v. England*, 4 B. & S. 782; 33 L. J., Q. B. 145.) The fact of goods being allowed to stand in the rain, or being improperly lotted, may be evidence of not selling at the best price. (*Poynter v. Buckley*, 5 C. & P. 512.) If a tenant be under covenant not to carry hay and straw off the premises, the landlord cannot, notwithstanding 56 Geo. 3, c. 50, s. 11 (*ante*, p. 206), sell hay and straw, taken as a distress, subject to a condition that it shall be consumed on the premises, without being liable to an action for not selling at the best price (*Ridgway v. Lord Stafford*, 6 Ex. 404; 20 L. J., Ex. 226; *Hawkins v. Walrond*, 45 L. J., C. P. 772; 1 C. P. D. 280), unless there is an express condition in the lease enabling him to do so.

If after the bailiff distrain the rent be paid to the landlord, the bailiff has no right to go on and sell for his expenses. (*Harding v. Hall*, 14 W. R. 646.)

It is provided by 57 Geo. 3, c. 93, that where a distress is made for arrears of rent *not exceeding 20l.*, the person

Sale for the best price.

Cost of the distress under 20l.

making the distress, or person employed by him, shall not have, take or receive any other or more costs or charges for or in respect of the same than those set down in the schedule to the Act. (Sect. 1.)

If any person shall in any manner levy, take or receive, or retain or take from the produce of the goods sold, any other or greater costs and charges than are mentioned in the schedule, or make any charge whatsoever for any act or thing mentioned in the said schedule, and not really done, it shall be lawful for the party aggrieved to apply to a justice of the peace for the county, who may, after examining into the complaint, order treble the amount of the moneys so unlawfully taken to be paid by the person so having acted to the party complaining, together with full costs (sect. 2); but no such order shall be made against the landlord unless he personally levied the distress. (Sect. 4.)

This statute is still unrepealed, but the schedule is practically superseded by the charges sanctioned by Appendix II. to the Distress for Rent Rules, 1888, made pursuant to 51 & 52 Vict. c. 21, s. 8. These rules and the appendix are set out in full in the Appendix (C.) to this volume. They authorize two scales of fees, charges, and expenses for distress, one where the sum demanded and due exceeds 20*l.*, and the other where it does not exceed 20*l.* The rules also provide that no person shall be entitled to any fees, charges, or expenses for levying a distress or for doing any act or thing in relation thereto other than those so authorized (r. 15); and that every bailiff levying a distress shall *on the request* of the tenant produce to him his certificate and a copy of the authorized charges. (R. 18.) The statutory charge would not be allowed for a man in possession of a growing grass crop during the period of its maturing. (*Ex parte Arnison*, L. R., 3 Ex. 56; 37 L. J., Ex. 57.) No penalty is imposed for exacting any greater costs, except that a bailiff proved to the satisfaction of a county court judge to have been guilty of any extortion or other misconduct (*Moore v. High Bailiff of Brompton County Court*, 37 Sol. J. 497) shall be liable to have his certificate summarily cancelled. (51 & 52 Vict. c. 21, s. 7.) The charges authorized for a distress belong to the bailiff and not to the landlord. (*Philipps v. Rees*, 24 Q. B. D. 17; 59 L. J., Q. B. 1.)

Broker to
give copy of
charges.

No request for a copy of the bailiff's charges is requisite under the still unrepealed Act, 57 Geo. 3, c. 93, s. 6, which enacts that every broker or other person who shall make

and levy any distress whatsoever, shall give a copy of his charges, and of all the costs and charges of any distress whatsoever, signed by him, to the person or persons on whose goods and chattels any distress shall be levied, although the amount of the rent demanded shall exceed the sum of twenty pounds. It was held that this section does not apply where the goods have not been sold (*Hills v. Street*, 5 Bing. 39); and that the landlord is not liable, unless he personally interferes in the distress, for the broker's neglect to deliver a copy of charges. (*Hart v. Leach*, 1 M. & W. 560.)

The landlord should leave the overplus of the proceeds of any sale, after satisfying the rent and costs, with the sheriff or undersheriff (2 Wm. & M. sess. 1, c. 5, s. 2; *Yates v. Eastwood*, 6 Ex. 805; 20 L. J., Ex. 303), and any unsold goods distrained he may return to the premises on which he distrained them. (*Evans v. Wright*, 27 L. J., Ex. 50; 2 H. & N. 527.) In practice the overplus is usually paid to the tenant or his agent, and when this is done the tenant cannot complain that it has not been paid over to the sheriff or undersheriff for his use, since the statute is thereby substantially satisfied (*per* Lord Abinger, *Lyon v. Tomkies*, 1 M. & W. 606); and, unless received in full satisfaction, the tenant does not by so receiving the overplus preclude himself from objecting that the proper amount has not been paid over. (*Ib.*) If the proceeds of sale are insufficient to satisfy the rent, the landlord may bring an action for the balance (*Philpott v. Lehain*, 35 L. T. 855), but not until after the goods have been sold. (*Lehain v. Philpott*, L. R., 10 Ex. 242; 44 L. J., Ex. 225.)

SECT. 10.—*Second Distress.*

Divers rents may be reserved under one lease in respect of separate parcels, and separately distrained for. (Shep. Touch. 81.) And where the rent in arrear consists of several amounts falling due on different days, there may be a separate distress for each. (*Anon.*, Moore, 7; *Gambrell v. Falmouth*, 4 A. & E. 73.) Nor does it matter that the first distress is taken for the rent which last became due. (*Palmer v. Strange*, 1 Leo. 43; S. C., *Pamer v. Stabick*, 1 Sid. 44.) As a general rule, however, a man may not split one entire demand and distrain twice for the same

Second
distress.

rent when he might have taken enough on the first occasion. (*Owens v. Wynne*, 4 E. & B. 579; *Bagge v. Mawby*, 22 L. J., Ex. 236; 8 Ex. 641.) But if the value of cattle distrained shall not be of the full value of the arrears distrained for (17 Car. 2, c. 7, s. 4); or if there are not sufficient goods on the premises on the first occasion; or if goods are of an uncertain or imaginary value, as pictures, jewels, racehorses, &c., and the landlord mistake their value (*Hutchins v. Chambers*, 1 Burr. 589); or if the landlord is prevented from realizing the distress by the conduct of the tenant (*Lee v. Cooke*, 27 L. J., Ex. 337; 3 H. & N. 203); or if cattle die in the pound, by the act of God, a second distress may be taken.

Abandonment.

The same rule against a second distress applies where the landlord, having distrained enough, voluntarily abandons it (*Bagge v. Mawby*, 22 L. J., Ex. 236; 8 Ex. 641; *Dawson v. Cropp*, 1 C. B. 961; 14 L. J., C. P. 281), unless the landlord withdraw the distress at the request and for the accommodation of the tenant (*Bagge v. Mawby*, *supra*; *Thwaites v. Wilding*, 12 Q. B. D. 4; 53 L. J., Q. B. 1; 49 L. T. 396; *Crosse v. Welch*, 8 Times L. R. 709), or is induced to do so by a false representation of the tenant. (*Wollaston v. Stafford*, 15 C. B. 278.) Merely quitting possession of goods after distress is not necessarily an abandonment (*Bannister v. Hyde*, 29 L. J., Q. B. 141); nor is failure to resume immediate possession upon being forcibly expelled (*Eldridge v. Stacey*, 15 C. B., N. S. 458); or allowing the goods of a stranger which have been distrained to be removed for a temporary purpose. (*Kerby v. Harding*, 6 Ex. 234; 20 L. J., Ex. 163.) The question of whether or not there has been an abandonment is one for the jury. (*Eldridge v. Stacey*, *supra*.)

SECT. 11.—*Tender of Rent.*

Effect of tender of rent.

A tender of the rent, without any costs, before seizure (although the warrant to distrain may have been delivered to the bailiff) extinguishes the right to distrain, and makes a subsequent distress illegal. (*Bennett v. Bayes*, 29 L. J., Ex. 224; 5 H. & N. 391.) A tender after distress and before impounding, of the rent and costs of the distress, makes the subsequent detainer illegal (*Loring v. Warburton*, 28 L. J., Q. B. 31; E. B. & E. 507; *Vertue v.*

Beasley, 1 M. & Rob. 21; *Six Carpenters' Case*, 1 Sm. L. C. 144, 9th ed.); and even after the impounding the tenant may, within the five or fifteen days allowed to replevy, tender the rent and the proper costs, and, if the landlord afterwards sell, may maintain an action against him upon the equity of the statute (*ante*, p. 320), which gives a right of sale where the goods are not replevied within a given time, notwithstanding that, at common law, a tender after impounding availed nothing, as the goods were then in the custody of the law. (*Johnson v. Upham*, 2 E. & E. 250; 28 L. J., Q. B. 252.) But the tenant must at his peril in each case tender the proper amount of rent and costs, and tender it unconditionally (*Finch v. Miller*, 5 C. B. 428), so that the landlord may accept it without prejudice to his right to recover more if actually due. The question of whether or not a tender was made conditionally is one of fact for a jury. (*Marsden v. Goode*, 2 C. & K. 133.) Accompanying words which do not require the landlord to make any admission as to the amount of rent due as a condition to its receipt do not amount to a conditional tender. (*Bowen v. Owen*, 11 Q. B. 130; 17 L. J., Q. B. 5; *Bull v. Parker*, 2 Dow. N. S. 345; *Jones v. Bridgman*, 39 L. T. 500.)

Thus, a tender of a sum if the plaintiff, who claimed a larger sum, would accept it as the whole balance really due (*Evans v. Judkins*, 4 Camp. 146); tender of a sum in payment of the half-year's rent due at Lady Day last (*Marquis of Hastings v. Thorley*, 8 C. & P. 573, doubted in *Jones v. Bridgman*, *supra*); and a tender of a quarter's rent, with a demand for a receipt to a particular day, it being in dispute whether one or two quarters' rent was due (*Finch v. Miller*, 5 C. B. 428), have been held invalid tenders. On the other hand, "I have sent you 26*l.* to settle one year's rent of N." (*Bowen v. Owen*, *supra*); "here is your quarter's rent" (*Jones v. Bridgman*, *supra*); and a tender under protest (*Scott v. Uxbridge, &c. Rail. Co.*, L. R., 1 C. P. 596; 35 L. J., C. P. 293; *Greenwood v. Sutcliffe*, [1892] 1 Ch. 1; 61 L. J., Ch. 59), have been held to be unconditional tenders.

The tender may be made to the landlord himself, notwithstanding he has authorized a broker to distrain and left the matter in his hands (*Smith v. Goodwin*, 4 B. & Ad. 413), or to his agent authorized to receive the rents. (*Bennett v. Bayes*, 29 L. J., Ex. 224; 5 H. & N. 391.)

To whom
tender made.

A bailiff authorized to distrain is impliedly authorized to receive the rent, notwithstanding his employer may have instructed him not to do so, and tender may be made to him (*Hatch v. Hale*, 15 Q. B. 10; 19 L. J., Q. B. 289); but tender to a man left in possession (being other than the person holding the warrant to distrain) is invalid. (*Boulton v. Reynolds*, 2 E. & E. 369.)

By whom it
may be made.

The tender need not be made by the tenant, it may be made by a third person with the tenant's prior authority or subsequent ratification. But if a stranger, without any interest in the property, voluntarily tender the rent, the landlord is not bound to receive it (Co. Litt. 206 b; *Watkins v. Ashwicke*, Cro. Eliz. 132), though the subsequent adoption of his act by the tenant would appear to make the tender by a stranger valid.

A tender of rent before the day on which it becomes due is not a good tender. (Bac. Abr. *Tender* (D),)

SECT. 12.—*Interference with Distress.*

Remedy of
landlord for
interference
with distress.

Goods, though distrained, remain until sale the *property* of the tenant (*Moore v. Pyrke*, 11 East, 52; *Smith v. Wright*, 30 L. J., Ex. 313; 6 H. & N. 821), and notwithstanding they are impounded are not regarded as in the possession of the landlord, but are treated as in *custodia legis*. (*Rex v. Cotton*, 2 Ves. Sr. 288; Parker, 112.) If the goods come into the possession of a third person otherwise than by an actual sale under the statute, the tenant as the owner of them can maintain an action for conversion. (*King v. England*, 33 L. J., Q. B. 145; 4 B. & S. 782; *Turner v. Ford*, 15 M. & W. 212.) But the landlord having neither the property in, or possession of, the goods cannot in case the distress is taken away or otherwise interfered with maintain an action either for conversion or trover (*Moneux v. Goreham*, 2 Sel. N. P. 1384, 9th ed.; *Iredale v. Kendall*, 40 L. T. 362; *Rex v. Cotton*, *supra*; *Wilbraham v. Snow*, 2 Saund. 47 a), though he might have an action for trespass. (Bullen, 211.) His proper remedy, however, is for rescue or poundbreach under the statute of 2 Wm. & M. sess. 1, c. 5.

Rescue
defined.

Rescue, or *rescous*, is a forcible taking by the owner or other person of goods from the custody of the distrainor

before they are impounded. (Co. Litt. 160 b.) There can be no rescue until the thing is actually seized, so that preventing a distress is not a rescue, but preventing the impounding after a seizure is. (*Iredale v. Kendall*, 40 L. T. 362.) If the distrainer abandon (*Knowles v. Blake*, 5 Bing. 499), or quit possession (*Dod v. Monger*, 6 Mod. 216) of the distress, retaking it is not a rescue. There may be a rescue in law as well as in deed, as where cattle being distrained go upon the premises of the owner while being driven to a public pound, and he refuse to deliver them up on demand. (Co. Litt. 161 a.)

In some cases rescue is a lawful remedy which the person aggrieved may safely pursue. Thus, if a distress is altogether wrongful and not merely irregular or excessive; if, for example, no rent is in arrear, or the distress is made after a sufficient tender, or in the night time; or if it is wrongful as to part, as, for example, in taking things absolutely privileged from distress (*Keen v. Priest*, 28 L. J., Ex. 157; 4 H. & N. 236), or, if the distress is detained after tender of the rent and charges, the owner may lawfully rescue it before it is impounded. So if, after impounding, the distrainer abuse the distress by working it. (*Smith v. Wright*, 6 H. & N. 821; 30 L. J., Ex. 313.)

Poundbreach consists either in breaking the pound or any part thereof, or in re-taking the things or any of them after they are impounded. Once goods are impounded, either in or off the premises, they are in the custody of the law, and cannot be removed against the will of the distrainer without a poundbreach being committed. It is immaterial that the pound is not fastened, and force is not necessary to constitute the offence. If either the tenant or a stranger does that which, if the goods were the property, or in the possession, of the landlord, would, as against him, amount to conversion or trover, the offender is guilty of poundbreach. Thus, where a landlord having distrained goods, employed as bailiff a sheriff's officer who, upon receiving a *fi. fa.* from the sheriff, sold the goods under it, the sheriff was held liable for poundbreach. (*Reddell v. Stowey*, 2 M. & Rob. 358.) But where a bailiff was in possession of goods under a distress, and the sheriff's officer seized them, but did nothing more than prevent their removal from the premises, this was held not to render the sheriff liable for poundbreach. (*Story v. Finnis*, 6 Ex. 123; 20 L. J., Ex. 144.)

When lawful.

Poundbreach defined;

never lawful. In poundbreach the offence is against the dignity of the law, and it is no defence that the distress was wrongful or irregular (*Cotsworth v. Betison*, 1 Ld. Raym. 105; *Parrett Navigation Co. v. Stower*, 6 M. & W. 564), or that the rent was tendered after impounding. (*Firth v. Purvis*, 5 T. R. 432.) But if the distrainer is about to deal with the distress in an illegal manner, the owner may interfere. (*Smith v. Wright*, 6 H. & N. 821; 30 L. J., Ex. 313.)

Indictment. Rescue and poundbreach are common law misdemeanours for which an indictment will lie. But the criminal law is rarely invoked for these offences.

Recaption. The landlord may pursue and re-take the goods wherever he may happen to find them (*Rich v. Woolley*, 7 Bing. 651); but he must not in so doing commit a breach of the peace; and in the case of a rescue the re-caption must be "upon a fresh pursuit," that is, without delay. (*Ib.*, p. 661.)

Action. There is a common law right of action in respect of rescue and poundbreach, but the most ample remedy is that given by statute. By 2 Wm. & M. sess. 1, c. 5, s. 4, it is provided "that upon any poundbreach or rescous of goods or chattels distrained for rent, the person or persons grieved thereby shall, in a special action upon the case for the wrong thereby sustained, recover his and their *treble damages* and costs of suit against the offender or offenders in any such rescous or poundbreach, any or either of them, or against the owners of the goods distrained, in case the same be afterwards found to have come to his use or possession." Instead of treble costs the landlord is now entitled to "a full and reasonable indemnity as to all costs and charges in and about the action." (5 & 6 Vict. c. 97, s. 2.)

An action under this statute is a penal action, and the plaintiff is not entitled to an affidavit of documents. (*Jones v. Jones*, 22 Q. B. D. 425; 58 L. J., Q. B. 178.)

The statute applies whether the goods are impounded on or off the premises. (11 Geo. 2, c. 19, s. 10; *Firth v. Purvis*, 5 T. R. 432.) But where goods fraudulently removed have been distrained on the premises of a third person, and afterwards rescued by him, it seems doubtful whether an action under the statute can be maintained against him. (*Harris v. Thirkell*, 20 L. T. 98.)

The person entitled to recover is the landlord and not the bailiff. If the bailiff has been injured, the landlord can recover in respect of such injuries. (*Alcayes v. Broome*, 2 Lutw. 1263.)

CHAPTER VII.

REMEDIES FOR WRONGFUL DISTRESS.

SECT. 1.—*Classification of improper Distresses.*

IN pursuing his summary remedy by distress, the landlord must be careful that the distress is neither illegal, irregular, nor excessive.

A mere threat to distrain gives the tenant no right of action, and money paid under a threat of distress, against which the tenant might have legally defended himself by replevin, is a voluntary payment, and cannot be recovered back or set off against another demand. (*Knibbs v. Hall*, 1 Esp. 84; *Brisbane v. Dacres*, 5 Taunt. 147, *per* Gibbs, J.)

Money paid under threat to distrain not recoverable.

An illegal distress is one which is wrongful in the very commencement, such as a distress by a stranger, or by the landlord after he has parted with his reversion, a distress when no rent is due, or after it has been tendered, or after a former distress for the same rent, distraining off the premises, or between sunset and sunrise, or in an unlawful manner, or by breaking open the outer door, or distraining things privileged from distress.

Illegal distress.

And in the same category is a distress contrary to an agreement with the tenant (*Giles v. Spencer*, 3 C. B., N. S. 244; 26 L. J., C. P. 237), or with a stranger. (*Horsford v. Webster*, 1 C. M. & R. 696).

In the case of an illegal distress the landlord is in the position of an entire stranger—a mere trespasser *ab initio*—and can confer no title to the goods distrained upon any person to whom, by sale or otherwise, he may purport to transfer them.

A distress is irregular when the taking of the distress is perfectly legal and in order, but some of the subsequent proceedings are unlawful. The most frequent instances of irregular distress are, selling without having given notice

Irregular distress.

or within the five (or fifteen, *ante*, p. 321) days allowed to replevy; selling growing crops before they are gathered, contrary to 11 Geo. 2, c. 19, s. 8; selling without appraisement (when necessary, *ante*, p. 321), or for less than the best price; and not leaving the overplus in the hands of the sheriff or undersheriff. (See upon these various points, Chap. VI.) And so, although a distress be lawful, it is unlawful to detain (*Loring v. Warburton*, 28 L. J., Q. B. 31; E. B. & E. 507), or remove (*Vertue v. Beasley*, 1 M. & Rob. 21) the goods when a tender of rent and costs is made after distress and before impounding, or to sell the distress when rent and costs have been tendered after impounding but within the time allowed for replevin. (*Johnson v. Upham*, 28 L. J., Q. B. 252; 2 E. & E. 250.)

At common law an irregularity in the conduct of a distress made the entire proceedings void, and the person distraining a trespasser *ab initio*. (*Six Carpenters' case*, 1 Sm. L. C. 144, 9th ed.) This was found to occasion hardship, and therefore, by 11 Geo. 2, c. 19, s. 19, it was provided that when any distress shall be made for any kind of rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining, or his agent, the distress itself shall not be deemed to be unlawful, nor the party making it be therefore deemed a trespasser *ab initio*; but the party aggrieved by such unlawful act or irregularity shall or may recover full satisfaction for the special damage sustained thereby and no more.

By the 20th section of the same statute no tenant shall recover in any action for any such unlawful act or irregularity as aforesaid if tender of amends hath been made by the party distraining or his agent before action brought. The protection of these sections extends to a distress which is irregular as being excessive, as well as to one irregular in the disposition of the distress (*Whitworth v. Smith*, 1 M. & Rob. 193; 5 C. & P. 250), though not to a distress illegal in the very commencement. (*Attack v. Bramwell*, 3 B. & S. 520; 32 L. J., Q. B. 146.) Therefore, the person who purchases under a distress which is merely irregular acquires a good title to the goods, and the remedy of the tenant is under the statute. (*Whitworth v. Smith*, *supra*; *Wallace v. King*, 1 H. Bl. 13.)

Excessive
distress.

By the Statute of Marlebridge (52 Hen. 3, c. 4) it is enacted that "distresses shall be reasonable and not too great." To be excessive a distress must be obviously dis-

proportioned to the rent. (*Field v. Mitchell*, 6 Esp. 71.) It has been considered that the price realized at a sale by auction is good *prima facie* evidence of the value of the goods. (*Wells v. Moody*, 7 C. & P. 59, *per* Parke, B.; *Rapley v. Taylor*, Cab. & El. 150, *per* Cave, J.; *sed contra*, *Smith v. Ashforth*, 29 L. J., Ex. 260, *per* Martin, B.) When a landlord is about to make a distress, he is not bound to calculate very nicely the value of the property seized, but he must take care that some proportion is kept between that and the sum for which he is entitled to take it (*per* Bayley, J., *Willoughby v. Backhouse*, 2 B. & C. 823), and in doing so is only bound to exercise a reasonable and honest discretion. (*Roden v. Eyton*, 6 C. B. 430.) Taking a single chattel, though of considerably greater value than the rent, is not excessive if there was no opportunity to take one of less value. (*Arenell v. Croker*, M. & M. 172.) The question of excess is one for the jury (*Smith v. Ashforth*, 29 L. J., Ex. 259), and an action will lie for an excessive distress although the sale, less the expenses, did not equal the rent due. (*Ib.*) The landlord is not bound by the amount of rent actually claimed at the time of distraining, and though he then claimed for more rent than is due, he will not be liable to an action unless the distress is excessive for the rent really due. (*Tancred v. Leyland*, 16 Q. B. 669; 20 L. J., Q. B. 316; *French v. Phillips*, 26 L. J., Ex. 82; *Glyn v. Thomas*, 25 L. J., Ex. 125; 11 Ex. 870; *Phillips v. Whitsed*, 29 L. J., Q. B. 164.) And an action will not lie for merely distraining for more rent than is in arrear, although it is alleged that the distress was made maliciously. (*Stevenson v. Neunham*, 13 C. B. 285; 22 L. J., C. P. 110.) But if the tenant pay the excess he may recover it back in an action for excessive distress (*Fell v. Whittaker*, L. R., 7 Q. B. 120; 41 L. J., Q. B. 78); but not in an action for money had and received. (*Glynn v. Thomas*, 11 Ex. 870; 25 L. J., Ex. 125.)

SECT. 2.—Action for Damages.

Inasmuch as the remedy by replevin is only available when both the distress is illegal and the things taken are legally distrainable, and as in replevin actions security has

Advantages of action for damages over replevin.

to be given for rent and costs the remedy most usually resorted to for wrongful acts committed by or during a distress is an action for damages.

Against
whom it lies.

When a distress is *illegal*, the person who committed the act complained of is responsible and not the landlord, unless he authorized or subsequently sanctioned the act done. (*Lewis v. Read*, 13 M. & W. 834; *Moore v. Drinkwater*, 1 F. & F. 134.) Receipt of the proceeds of sale without inquiry, but without knowledge of anything illegal done by the bailiff will not make the landlord liable. (*Freeman v. Rosher*, 13 Q. B. 780; 18 L. J., Q. B. 340; *Green v. Wroe*, W. N. (1877), p. 130.) If, when he knows the circumstances, he repudiates the act, he is not bound by it. (*Hurry v. Rickman*, 1 M. & Rob. 126.) But he is responsible for any mere *irregularity*, although done without his knowledge or sanction. (*Haseler v. Lemoyne*, 5 C. B., N. S. 530; 28 L. J., C. P. 103.) And where a bailiff has made an excessive distress, the landlord may compensate the tenant and recover the amount against the bailiff. (*Megson v. Mapleson*, 32 W. R. 318; 49 L. T. 744.)

By whom.

An action will lie either at the suit of the tenant, of the owner of the goods, or of a person having the mere enjoyment of the use of the chattels. (*Fell v. Whittaker*, 41 L. J., Q. B. 78; L. R., 7 Q. B. 120.)

Form of
action.

The indorsement on the writ may be for "damages for improperly distraining" which shall be sufficient, whether the distress complained of be wrongful, or excessive, or irregular, and whether the claim be for damages only, or for double value. (R. S. C., 1883, App. A., pt. III., s. 4.)

The statement of claim will be a short statement of the facts showing that a wrong has been committed, and whether it is complained of as a common law tort or a breach of a statutory duty. Where the cause of action is that the landlord has retained the overplus, the tenant must not sue as for money had and received for his use, but in tort for the breach of the statutory obligation to pay over the overplus to the sheriff or undersheriff. (*Yates v. Eastwood*, 6 Ex. 805; 20 L. J., Ex. 303; *Evans v. Wright*, 2 H. & N. 527; 27 L. J., Ex. 50.)

Defences.

By way of defence to an action for illegal, excessive, or irregular distress, the defendant may plead specifically such matters as, if proved, will show that he acted according to his legal rights, or he may plead "not guilty by

"Not guilty
by statute."

statute." This right, which was given by 11 Geo. 2, c. 19, s. 21, is preserved by the R. S. C., 1883, subject to this restriction, that if the defendant so plead, he shall not plead any other defence to the same cause of action without the leave of the Court or a judge (Ord. XIX., r. 12), and he must state the Act and section of the Act upon which he relies in the margin of his pleading (Ord. XXI., r. 19), thus, "By statute 11 Geo. 2, c. 19, s. 21 (public Act)." This defence not only admits proof of all matters of justification, but puts in issue the tenancy and ownership of the goods, and also the irregularities complained of (*Williams v. Jones*, 11 A. & E. 643; *Ross v. Clifton*, 11 A. & E. 631), and in fact entitles the defendant to give in evidence everything he might lawfully do in order to make the distress. (*Eagleton v. Gutteridge*, 11 M. & W. 469, *per Parke, B.*) Thus, in an action in trespass for illegal distress, the defendant was held entitled, under this plea, to give in evidence that he entered under a warrant of distress for rent, was forcibly turned out of possession, and thereupon broke open the outer door of the house, and re-entered to seize the goods. (*Ib.*; *Bannister v. Hyde*, 29 L. J., Q. B. 141.) And under this plea, the defendant may also give evidence of a tender of amends under sect. 20 of 11 Geo. 2, c. 19, and need not pay the amount into Court. (See *Jones v. Gooday*, 9 M. & W. 736.) The plea is only available where the distress is made upon the premises chargeable with the rent, and not where a distress on other premises is justified on the ground of a fraudulent removal. (*Vaughan v. Davis*, 1 Esp. 257; *Ferneaux v. Fotherby*, 4 Camp. 136.)

In the case of an illegal distress, the distrainer is a trespasser *ab initio*, and the full value of the goods which have been lost to the plaintiff, without any deduction for rent, is recoverable as damages (*Attack v. Bramucell*, 32 L. J., Q. B. 146; 3 B. & S. 520; *Keen v. Priest*, 28 L. J., Ex. 157; 4 H. & N. 236); and where the landlord has placed a man in possession, the plaintiff is entitled to damages, although he has had the use of the goods all the time. (*Bayliss v. Fisher*, 7 Bing. 153.) Where the wrong complained of is the removal of fixtures, the measure of damages is not the amount of the proceeds of their sale after being severed, but may be their value to an incoming tenant (*Moore v. Drinkwater*, 1 F. & F. 134), or may be their cost to the tenant.

Damages for
illegal dis-
tress.

Double value : When a distress *and sale* is made for rent pretended to be in arrear and due, when in truth no rent is due, the owner of the goods distrained is entitled to recover by action double the value of the goods with full costs of suit. (2 Wm. & M. sess. 1, c. 5, s. 5.) This only applies where the goods have been actually sold. (*Masters v. Harris*, 1 C. B. 715.)

for irregular distress ;

An action for irregularity in dealing with a distress cannot be maintained without proof of special damage, on failure of which the plaintiff is not entitled to a verdict for even nominal damages, but the defendant is entitled to the verdict. (*Lucas v. Tarleton*, 3 H. & N. 116; *Rodgers v. Parker*, 18 C. B. 112; 25 L. J., C. P. 220; *Proudlove v. Tremloir*, 1 Cr. & M. 326.) Neither can he recover in any event, if tender of amends have been made and refused before action. (*Ante*, p. 352.)

for excessive distress.

For an excessive distress, the damages, in case of a sale of the goods, are the fair value of the goods after deducting rent and costs. (*Wells v. Moody*, 7 C. & P. 59.) If no sale have taken place, the plaintiff is entitled to nominal, though he prove no actual, damage, since the law will presume damages from a man being prevented from dealing with his property. (*Chandler v. Doulton*, 34 L. J., Ex. 89; 3 H. & C. 553.) If the distress is made for more rent than is in arrear, and the tenant pay the sum to get rid of the distress, he may recover the excess he was obliged to pay and damages for the annoyance he may have suffered. (*Fell v. Whittaker*, L. R., 7 Q. B. 120; 41 L. J., Q. B. 78.) Whether impounded on the premises or off the premises, the tenant is entitled to recover such actual damage as he has sustained through loss of the use and enjoyment of the excess taken, or of the power of disposing freely thereof, or through the inconvenience and expense in procuring sureties to a larger amount than he otherwise would have required on replevyng. (*Piggott v. Birtles*, 1 M. & W. 441.) He is also entitled to the excess of the value of the goods above the rent and the expenses of distress.

Action in the county court.

An action for irregular, excessive or illegal distress, when the amount claimed is under 50*l.*, may be brought in the County Court.

SECT. 3.—*Injunction.*

When the distress is illegal or the right to distrain doubtful, the distress may be restrained by injunction upon such terms, where the right is merely doubtful, as may be thought fit for securing the landlord in the event of his being ultimately held to be entitled. (*Shaw v. Earl of Jersey*, 4 C. P. D. 120, 359; 48 L. J., C. P. 308.) The terms imposed are generally payment of the rent into Court (*Walsh v. Lonsdale*, 21 Ch. D. 9), and the Courts do not favour an interference by injunction with the legal right of distress. (*Carter v. Salmon*, 43 L. T. 490.) By injunction, however, the plaintiff frequently obtains the relief formerly only obtainable by replevin, that is the possession of the goods pending the trial of the question of the legality of the distress. And when the goods taken are not distrainable, he may obtain relief for which replevin is not available. Injunction.

SECT. 4.—*Replevin.*

If the object of proceedings is to procure the restitution of the specific chattels taken, instead of compensation in damages, the proper course is an action of replevin. (See *Gibbs v. Cruikshank*, 42 L. J., C. P. 273, *per* Bovill, C. J.; *Mennie v. Blake*, 25 L. J., Q. B. 399; 6 E. & B. 842, *per* Coleridge, J.) Replevin is not available where the distress was originally lawful. (28 L. J., Q. B. 256, *per* Lord Campbell, C. J.) But whenever there has been a distress which is wholly illegal, and not merely irregular or excessive, the tenant has his remedy by replevin. Thus it lies where no rent whatever was due, or where the goods have been detained after tender of rent and costs before the impounding. It may be resorted to to obtain the recovery of all kinds of goods which can lawfully be distrained, but not of fixtures, animals *feræ naturæ*, and other things which from their nature cannot be the subject of distress. (*Nibley v. Smith*, 4 T. R. 504.) Object of replevin.

Replevin consists of the re-delivery to the owner of the goods taken, upon his undertaking to try the validity of the distress. Proceedings in replevin consist—(1) of the tenant giving security that he will prosecute an action of When it lies.

replevin, whereupon the goods are restored; and (2) of the action so undertaken to be brought. So long as the goods remain unsold the tenant may replevy. (*Jacob v. King*, 5 Taunt. 451.)

By and
against whom
it lies.

The action must be brought by the person who has the property, absolute or qualified, in the goods. (Bullen, 246.) But it is said a mere possessory right to the goods is not sufficient (*Templeman v. Case*, 10 Mod. 25), differing in this respect from an action for damages. (*Ante*, p. 334.) It may be brought against either the bailiff actually making the distress or the person ordering it, or both.

The replevy.

Formerly the replevy was made by the sheriff, who took the goods from the distrainor and re-delivered them to the owner upon the execution of a replevin bond by the owner and two sureties conditioned to prosecute his suit with effect and without delay against the distrainor, and to return the goods if a return should be awarded. But this power has been taken away, and now under the County Courts Act, 1888, the registrar of the county court of the district in which any goods subject to replevin shall be taken, shall be empowered to approve of replevin bonds, to grant replevins, and to issue all necessary process in relation thereto, and such process shall be executed by the high bailiff. Such registrar shall, at the instance of the party whose goods shall have been seized, cause the same goods to be replevied to such party upon his giving security to prosecute an action against the distrainor, either in the High Court or in the county court. (51 & 52 Vict. c. 53, s. 134.) If the replevisor wishes to proceed in the High Court, he must give security to cover the alleged rent in respect of which the distress was made, and the probable costs of the action, conditioned to commence his action within one week from the date of giving security, and prosecute such action with effect and without delay, and be prepared to prove (unless judgment be obtained by default) that he had good ground for believing either that the title to some corporeal or incorporeal hereditament the rent or value whereof exceeded 20*l.* by the year, or to some toll, market, fair or franchise was in question, or that such rent or damage or the value of the goods seized exceeded 20*l.* (Sect. 135.) If he elect to sue in the county court, the replevisor must give security for the alleged rent and the probable costs of the action, conditioned to commence his action within one month from the date of the security. (Sect. 136.) And in

both cases the securities are conditioned to prosecute the action with effect (which means to a successful termination, *Tummons v. Ogle*, 25 L. J., Q. B. 403; 6 E. & B. 571) and without delay (which means with due diligence, *Gent v. Cutts*, 11 Q. B. 288; 17 L. J., Q. B. 55), and to make return of the goods if a return thereof shall be adjudged. (See forms 244 and 245 to the C. C. Rules, 1889.) The security shall be in the form of a bond, with sureties to the distrainer (51 & 52 Vict. c. 43, s. 108); or a deposit of a sum, equal to the amount of the security which would be required, with the registrar, if the security is required to be given in the county court, or with a master if required to be given in the High Court. (Sect. 109; C. C. Rules, 1889, Ord. XXIX.) Replevin bonds are exempt from stamp duty. Security being given, the registrar issues his warrant to the high bailiff to redeliver the goods to the replevisor. (C. C. Rules, 1889, Form 246.)

In the replevin action the replevisor is, of course, The action. plaintiff, and the distrainer defendant, and after the issue of the plaint or writ the action proceeds in the same way as any other action. No other cause of action can be joined with it in the county court (C. C. Rules, 1889, Ord. XXXIV. r. 1), but that restriction does not apply in the High Court. (R. S. C. 1883, Ord. XVIII. r. 1.) If brought in the county court it may be removed by *certiorari* to the High Court, upon the application of the defendant, and upon his giving security for such an amount, not exceeding 150%, as the master may think fit, when the defendant is prepared to prove that he has good ground for believing either that the title to some corporeal or incorporeal hereditament, the rent or value whereof exceeded 20% a year, or to some toll, market, fair, or franchise is in question, or that the rent, in respect of which the distress was taken or the value of the goods exceeds 20%. (51 & 52 Vict. c. 43, s. 137.) Unless so removed the county court has full jurisdiction, whatever the amount of the rent, and though title come in question. (*Fordham v. Akers*, 4 B. & S. 578; 33 L. J., Q. B. 67.) If the rent or value of the goods exceed 20%, but not otherwise, except with the leave of the judge, there is an appeal from the county court upon a question of law or the admission or rejection of evidence. (51 & 52 Vict. c. 43, s. 120.)

If the plaintiff succeed in the action, he is entitled to special damages, if any are alleged and proved, but as the

goods are restored on the replevin the plaintiff is generally awarded the expenses of the replevy, and no other damages, unless, where suing in the High Court, he joins with the replevin some other cause of action. (*Gibbs v. Cruikshank*, L. R., 8 C. P. 454; 42 L. J., C. P. 273.) After judgment for the plaintiff in replevin he is precluded from bringing any other action for taking the same goods in respect of which the replevin was brought (*ib.*), but the bar does not extend to other causes of action arising out of the same distress. (*Ib.*)

If the defendant succeed in the action, he is entitled, when suing in the High Court, to a return of the goods distrained and his costs (not including the costs of distress, *Jamieson v. Trevelyan*, 10 Ex. 748; 24 L. J., Ex. 74), for which he will have a *fi. fa.* When suing in the county court the successful defendant may require the Court or the jury (if the action is tried with a jury) to find the value of the goods distrained, and if the value be less than the amount of rent in arrear, judgment shall be given for such value; but if the amount of rent in arrear be less than the value so found, judgment shall be given for the amount of such rent, and may be enforced in the same manner as any other judgment of the Court. (C. C. Rules, 1889, Ord. XXXIV. r. 4, Form 247.)

If the replevisor break the condition of the bond, as by non-prosecution of the action, the distrainer may bring his action, claiming either the specific amount of the replevin bond or damages. If he claim the former and judgment go by default, such judgment is final, and not interlocutory, and no writ of inquiry is necessary to assess damages. (R. S. C. 1883, Ord. XXVII. r. 2.) If he claim damages the judgment by default is interlocutory, and followed by a writ of inquiry. (*Dix v. Groom*, 5 Ex. D. 91; 49 L. J., Q. B. 430; R. S. C. 1883, Ord. XXVII. r. 4.)

SECT. 5.—*Remedy in case of Agricultural Holdings.*

Remedy for
wrongful
distress under
Agricultural
Holdings Act,
1883.

In the case of any holding to which the Agricultural Holdings Act, 1883, applies, when any dispute arises in respect of any distress having been levied contrary to the provisions of that Act, or as to the ownership of any live stock distrained, or as to the price to be paid for the feed-

ing of such stock, or as to any other matter relating to a distress, such dispute must be determined by the county court in which the holding is situate (with a right of appeal, 51 & 52 Vict. c. 43, s. 170; *Hanmer v. King*, 57 L. T. 367), or by a court of summary jurisdiction (as defined by 42 & 43 Vict. c. 49, s. 50), with a right of appeal to a court of general or quarter sessions. (46 & 47 Vict. c. 61, s. 46.)

The Court may order restoration of things unlawfully distrained, ascertain the price agreed to be paid for feeding, or make any other order which justice requires. (*Ib.*) An order of the county court or court of summary jurisdiction shall not be quashed for want of form or removed by *certiorari* into any superior Court. (Sect. 48.) As the resort to these inferior Courts is permissive, it is not likely they will be largely resorted to, except to determine disputed questions as to the ownership of live stock, since claims for wrongful distress often involve most difficult points of law.

SECT. 6.—*Remedy for Small Holdings in Metropolis.*

For any form of wrong, committed during a distress, within the metropolitan police district, where the tenancy is weekly or monthly, or the rent is under 15*l.*, a summary remedy is provided by 2 & 3 Vict. c. 71, s. 39 ("An Act regulating the police courts in the Metropolis"), which enacts that "on complaint to any of the police magistrates by any person who shall within the metropolitan police district have occupied any house or lodging by the week or month, or, where the rent does not exceed the rate of 15*l.*, by the year, that his goods have been taken from him by an unlawful distress, or that the landlord, or his broker, has been guilty of any irregularity or excess in respect of such distress, it shall be lawful for such magistrate to summon the party complained against, and if, upon the hearing of the matter, it shall appear to the magistrate that such distress was improperly taken or unfairly disposed of, or that the charges made by the party having distrained, or attempted to distrain, are contrary to law, or that the proceeds of the sale of such distress have not been duly accounted for to the owner, it shall be lawful for the magistrate to order the distress so taken, if not sold, to be

Summary remedy within the metropolitan police district.

returned to the tenant on payment of the rent at such time as the magistrate shall appoint; or if the distress shall have been sold, to order payment to the tenant of the value thereof, deducting thereout the rent which shall appear to be due, such value to be determined by the magistrate; and such landlord, or party complained against, in default of compliance with any such order, shall forfeit to the party aggrieved the value of such distress, not being greater than 15%, such value to be determined by the magistrate."

CHAPTER VIII.

HOW TENANCIES DETERMINE.

WE have previously noticed the manner in which such frail tenures as tenancies at sufferance (*ante*, p. 2), and at will (*ante*, p. 3), are determined. Other tenancies may determine (1) by effluxion of time; (2) under a power at a period short of the full term; (3) by merger; (4) surrender; (5) disclaimer; (6) forfeiture; or (7) in the case of a tenancy from year to year by a notice to quit.

SECT. 1.—*Effluxion of Time.*

Where a lease is granted for a term of years, or for one year only (*Cobb v. Stokes*, 8 East, 358), then upon the expiration of the last day of the term (*Ackland v. Lutley*, 9 A. & E. 879), the tenancy ends without notice to quit or other formality. So do all underleases granted by the lessee. (See *Weller v. Spiers*, 20 W. R. 772.)

By effluxion of time.

Term certain.

In the same way, where a lease is granted for a term of years conditionally, that is, subject to be defeated by the happening of a particular event, the happening of such event *ipso facto* determines the tenancy. Thus, a lease for a term of years, if A. B. shall so long live, determines either by the expiration of the term or the death of the person so named. So where premises are leased for a term certain if the tenant shall so long continue to reside there, the term is at end when he ceases to live on the premises. (*Doe v. Clarke*, 8 East, 185.)

Term conditional.

SECT. 2.—*Under a Power.*

If a lease is for a certain term, but determinable by one or either party at an earlier date (*ante*, p. 94), the party

Under a power.

determining it must give the notice provided for in the lease, or if no provision is made he must give a reasonable notice. (*Goodright v. Richardson*, 3 T. R. 462.) And where the notice is to determine the lease on a given date, the date specified must be that of the expiration of one of the periods authorized for its determination. (*Cadby v. Martinez*, 11 A. & E. 720; *Bird v. Baker*, 28 L. J., Q. B. 7; 1 E. & E. 12.) A verbal notice is not sufficient where the terms of the power require a written one. (*Legg v. Benion*, Willes, 43.)

Where the proviso required the notice to be delivered to the tenant or his assigns, it was held that a notice sent to his last-known address, and also served upon his under-tenant, was insufficient, though the tenant had disappeared and could not be found. (*Hogg v. Brooks*, 15 Q. B. D. 256.) And in the case of a lease made determinable on either the lessor or lessee giving notice to the other of them, or "his or their representatives or assigns," the equitable tenant for life under the will of the lessor was held not to be his "representative or assign" to whom a valid notice could be given. (*Easton v. Penny*, 67 L. T. 290.)

The notice usually refers in terms to the power, but this is unnecessary if it is clear the power is intended to be exercised. (*Giddins v. Dodd*, 25 L. J., Ch. 451; 3 Drew. 485.) The effect of a valid notice is to put an end to the lease, so as to discharge a surety for the tenant, notwithstanding that by a new arrangement the tenant may continue to occupy the premises. (*Ib.*)

SECT. 3.—*Merger.*

Merger
defined.

A tenancy is determined whenever the term and the reversion both vest, without any intervening estate, in the same person in the same right (*Chambers v. Kingham*, 10 Ch. D. 743; 48 L. J., Ch. 169; 2 Shep. Touch. 347; 5 Cruise, Dig. tit. 39), for then the lesser interest merges in the greater. (2 Preston, Abst. 12; Smith, Law of Prop. 1150, 3rd ed.) Thus, if a tenant for years acquire the fee simple reversion, the term of years is merged in the inheritance.

The requisites to produce the operation of merger are :—

(1) The estate in immediate remainder or reversion must, in contemplation of law, be as large or larger than the preceding estate to be absorbed. But a term of years in possession may merge in a term of years in reversion, even though of shorter duration than itself, for a term in reversion is accounted the higher estate. (*Hughes v. Robotham*, Cro. Eliz. 302; *Stephens v. Bridges*, 6 Madd. 66.) Thus, if a person, seised in fee, grant a lease for twenty-one years, and afterwards grant a lease for ten years to a third person who assigns it to the lessee for twenty-one years, this will operate as a merger of the twenty-one years' term. (*Ib.*)

(2) There must be a union of two concurrent estates. An *interesse termini* to commence *in futuro* will not merge in the freehold acquired by the person having the *interesse termini* so long as the latter gives only a future right to possession. (*Doe v. Walker*, 5 B. & C. 111, 120.) Therefore where A., being lessee of premises for a term of twenty-one years expiring in 1809, in the year 1799 took a further lease of the same premises for sixty years to commence from the expiration of the first term, and the lessor dying in 1800 devised the premises to A. for life, who, in 1806, conveyed his life estate to B., it was held that although A.'s estate in the lease expiring in 1809 was merged in his life estate, his interest in the lease which was to commence in 1809 was not. (*Ib.*; and see *Hyde v. Warden*, 3 Ex. D. 72; 47 L. J., Q. B. 121.)

(3) The estates must be of the same nature, that is, both legal or both equitable. (4) They must both be held in the same right. There is no merger where one estate is vested in the person beneficially, and the other *en autre droit*. (*Chambers v. Kingham*, 10 Ch. D. 743; 48 L. J., Ch. 169; *Platt v. Sleaf*, Cro. Jac. 275; *Jones v. Davies*, 5 H. & N. 766; 7 *ib.* 507; 29 L. J., Ex. 374; 31 *ib.* 116.) A distinction was formerly supposed to exist between a case where the two estates came together by act of law, and where they came together by act of the party, it being considered that in the latter case the less estate would merge. (3 Preston, Conv. 273 *et seq.*) But the distinction, if it ever existed, was recognized in law only, and exists no longer. Mergers were not favoured in equity, nor allowed except for special reason. (*Philips v. Philips*, 1 P. Wms. 41.) And the Judicature Act, 1873, provides that there shall not after the commencement of the Act be

Requisites
to produce
merger.

(1) A reversion greater than the preceding estate.

(2) Union of two concurrent estates.

(3) Estates of the same nature;

(4) held in the same right.

(5) No intervening estate.

any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity. (36 & 37 Vict. c. 66, s. 25, sub-s. 4.) The effect of this section is, that there will not be a merger contrary to the intention of the parties. (*Snow v. Boycott*, 66 L. T. 762.) (5) There must be no intervening estate, however short. (*Burton v. Barclay*, 7 Bing. 745.)

The question of merger may be one of construction. And where a demise was made of a strip of land for the purpose of making a canal, and the lessees covenanted to allow to the lessors certain rights of way across the canal, it was held that as the intention of the parties was that such rights should be enjoyed by the lessors as owners of the reversion and not as owners of the adjoining lands, upon the acquisition by the lessees of the reversion in the canal, a merger took place by virtue of which those rights were extinguished. (*Lord Dynevor v. Tennant*, 13 App. Cas. 279; 57 L. J., Ch. 1078.)

Merger does not prejudice underlease.

Merger, like a surrender, leaves unaffected any underlease or derivative title created out of the term, except that the next vested estate shall be deemed the reversion of such underlease. (8 & 9 Vict. c. 106, s. 9, *infra*, p. 355.)

SECT. 4.—*Surrender.*

Surrender defined.

Determination of a tenancy may be effected by surrender, which is defined as a yielding up by mutual agreement of an estate for life or years to him that hath the *immediate* estate in reversion or remainder wherein the estate for life or years may merge. (Co. Litt. 337 b.)

Requisites to a surrender.

It is necessary that the surrenderee should have an estate of a higher or greater nature than, or of an equal nature with, that of the surrenderor in the same hereditaments (Shep. Touch. 300), so that the estate surrendered may be capable of merging therein. Therefore, a tenant for life cannot surrender to a tenant in remainder for years, but a tenant for years may surrender to him who has the reversion only for years, even though for a term of shorter duration (*Hughes v. Robotham*, Cro. Eliz. 302; Bac. Abr. *Leases* (s. 2)), and although the term for years in possession cannot merge in the term in reversion, it will merge in the

inheritance. (*Ib.*; *Challoner v. Davies*, 1 Ld. Raym. 402.) The lessee surrendering must have an estate in possession and not a mere right, and accordingly, he cannot surrender until he has entered on the demised premises, for until entry there is no reversion into which the term may merge. (Co. Litt. 338 a.) So if a lessee be ousted by a stranger and afterwards surrender to his lessor, the surrender is void. For the same reason there can be no surrender of a term to commence at a future day until the lessee is entitled to and has obtained possession. (*Ib.*; Bac. Abr. *Leases* (s. 3, 2).)

There must be privity of estate between the surrenderor and surrenderee. Thus, the lessee or the assignee of the term may surrender to the lessor or the assignee of the reversion, because of the privity of estate, but not to a receiver appointed by the Court and who takes no estate in the property. (*Cornish v. Searell*, 8 B. & C. 471.)

The surrender must be made to the person who has the immediate reversion expectant upon the term surrendered. An under-lessee could not surrender to the original lessor. Where a lessor grants a lease to A. and a lease in remainder to B., the lessor is the proper person to accept a surrender from A. (*Smith v. Day*, 2 M. & W. 684); but if, after granting a lease to A., the lessor grants his reversion for a term of years to B., the latter is the person to whom A. should surrender. (*Challoner v. Davies*, *supra*; the statute of Anne, dispensing with the necessity for attornments, seems to have been overlooked in the decision of *Edwards v. Wickwar*, 35 L. J., Ch. 309, n.)

A surrender may be either in express terms or by operation of law.

There cannot be a surrender to operate *in futuro* (*Doe v. Milward*, 3 M. & W. 328, 332, *per* Parke, B.; but see *Parker v. Briggs*, 37 Sol. J. 452), but it is clear that an express surrender may be subject to a condition, either precedent or subsequent. (Shep. Touch. 307.) If the condition be not performed, and is a condition precedent, the surrender will not take effect; if a condition subsequent the estate of the lessee will revest (Shep. Touch. 308; Co. Litt. 218 b), and he will remain liable under the stipulations in his lease (*Coupland v. Maynard*, 12 East, 134); and a surrender by operation of law by the acceptance of a new lease or of an estate inconsistent with the lease, is, in general, taken to be conditional upon the new lease or estate being validly created. (*Doe v. Courtenay*, 11 Q. B. 702; 17 L. J., Q. B. 151; *Doe v. Poole*, 11 Q. B. 713;

Conditional
surrender.

17 L. J., Q. B. 143.) But where an express surrender, which is in terms absolute, is made in consideration of a new lease to be granted, the original term is not revived if the new lease should be afterwards avoided. (*Doe v. Bridges*, 1 B. & Ad. 847.)

*Express
surrender.*

At common law a lease of corporeal hereditaments whether by deed or parol for any number of years could be surrendered without either deed or writing (*Farmer v. Rogers*, 2 Wils. 26; Co. Litt. 338, a), though a deed was always necessary to the surrender of a lease of incorporeal hereditaments. (Co. Litt. 338, a; 13 M. & W. 310.) The Statute of Frauds, however, enacted that no leases, estates, or interests, either of freehold or terms of years or any uncertain interest (not being copyhold or customary interest) of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall be assigned, granted, or surrendered, unless it be by deed or note in writing signed by the party so assigning, granting, or surrendering the same or his agent thereunto lawfully authorized by writing, or by act and operation of law. (29 Car. 2, c. 3, s. 3.) This statute made a "note in writing" necessary (*Mollett v. Brayne*, 2 Camp. 103; *Taylor v. Chapman*, Peake, Ad. Ca. 19) and sufficient (*Farmer v. Rogers*, *supra*) in the case of a surrender of any tenancy of corporeal hereditaments, whether created by deed or parol.

*Must be by
deed.*

The statute 8 & 9 Vict. c. 106, s. 3, further enacted that a surrender in writing of an interest in any tenements or hereditaments (not being a copyhold interest and *not being an interest which might by law have been created without writing*) shall be void at law unless made by deed. The effect of this Act is, that a lease not exceeding three years from the making thereof at a rent of two-thirds the improved value (which by sect. 1 of the Statute of Frauds may be created without writing) may be surrendered by a writing not under seal. In all other cases it must be by deed.

*No special
form neces-
sary,
provided it
purport to
re-vest the
property.*

No technical words are requisite to work a surrender, but any form of words which indicate the intention will be sufficient. (*Challoner v. Davies*, 1 Ld. Raym. 402.) But there must be a writing which purports to re-vest the estate in the reversioner. The statutes are not satisfied by the mere cancellation of the lease. (*Roe v. Archbishop of York*, 6 East, 86; *Doe v. Thomas*, 9 B. & C. 288; *Ward v. Lumley*, 5 H. & N. 87; 29 L. J., Ex. 322.) Nor by a recital in a second lease that it was granted in part con-

sideration of the surrender (which did not exist) of a prior lease. (*Roe v. Archbishop of York, supra.*) But where a lease is given up to be cancelled and a new lease is granted to the same lessee (13 M. & W. 304), or to a stranger under circumstances from which the assent of the old lessee could be inferred (*Walker v. Richardson*, 2 M. & W. 882; and see 13 M. & W. 310; *Davison v. Gent*, 1 H. & N. 744; 26 L. J., Ex. 122), it will be strong evidence of a surrender by operation of law.

A surrender by operation of law or implied surrender occurs where the one party does, and the other assents to, an act which is inconsistent with the continuance of the lease or tenancy. The act itself amounts to a surrender; it is not necessarily the result of intention, for a surrender may take place independently and even in spite of intention. Nor would it alter the effect of the act to show that there was no intention to surrender the particular estate, or even that there was an express intention to keep it unsurrendered. (*Lyon v. Reed*, 13 M. & W. 285, 306.) Thus, there cannot be two concurrent leases or tenancies of the same premises, and therefore, if, during the continuance of a lease, the landlord, with the assent of the tenant, grant a new lease, the previous lease is surrendered by operation of law; or, in other words, the tenant having assented is estopped from afterwards denying the landlord's power to grant the new lease, which he could only do, assuming the old lease to be surrendered. (*Lyon v. Reed, supra*; *Ex parte Vitale, Re Young*, 47 L. T. 480; *Corpus Christi College v. Rogers*, 49 L. J., Ex. 4.) And this is so, whether the new lease is to the tenant himself (*ib.*; *McDonnell v. Pope*, 9 Hare, 705), to himself jointly with a third person (*Hamerton v. Stead*, 3 B. & C. 478; *Graham v. Whichelo*, 1 Cr. & M. 188), or, with the tenant's assent, to a third person alone. (*Davison v. Gent*, 1 H. & N. 744; 26 L. J., Ex. 122; *Thomas v. Cook*, 2 B. & Ald. 119; *Baring v. Abingdon*, [1892] 2 Ch. 381.) His assent in the latter case would be sufficiently evidenced by his giving up possession to the new lessee. (*Davison v. Gent, supra.*) In fact the change of possession is a necessary part of the consent. (*Wallis v. Hands*, 37 Sol. J. 284.) It is immaterial that the new lease is for a less term than the unexpired residue of the old one, for a term of a hundred years would be surrendered if there was a new demise for a week (*Crowley v. Vitty*, 21 L. J., Ex. 136, *per Parke, B.*), or even by the creation of a tenancy at will. (*Mellous v.*

Surrender by operation of law.

(1) Grant of new lease.

May, Cro. Eliz. 874.) Nor does it matter, provided the new lease is one which can be created by parol, that the old lease was by deed and the new one is by parol. (*Ib.*; *Dodd v. Acklom*, 13 L. J., C. P. 11; 6 M. & Gr. 679, *per* Tindal, C. J.); or that the new lease be made to commence at a future day, provided that day fall within the term granted by the first lease (*Ive's Case*, 5 Co. 11 a, b), as if a lessee for twenty years take a lease for three, to begin ten years after, this is a present surrender of the whole term. But no surrender is created where the second lease is to commence after the expiration of the first (being wholly reversionary), or where it is made to commence on a contingent event which may not happen until the determination of the first. (Bac. Abr. *Leases* (s. 3).)

Where a tenant, under a demise by deed, gave an invalid notice to quit, and threatened to leave unless his rent was reduced and he were relieved from a covenant to repair fences, in answer to which the landlord wrote that the rent would be reduced as from the following May, and the jury having found that a new parol tenancy was created as from May, this was held to operate as a surrender of the old lease. (*Parker v. Briggs*, 37 Sol. J. 452.)

It is, however, an implied condition of a surrender by operation of law that the new lease should be a valid one according to its purport. (*Ante*, p. 348.) So that a lease which is void or voidable (*Doe v. Poole*, 17 L. J., Q. B. 143; *Wilson v. Sewell*, 4 Burr. 1980; *Davison v. Stanley*, *ib.* 2213; *Easton v. Penny*, 67 L. T. 291), or which does not pass an interest according to the contract of the parties (*Doe v. Courtenay*, 17 L. J., Q. B. 151), will not operate as a surrender.

Formerly, a mere agreement for a new lease with the tenant did not work a surrender (*Foquet v. Moor*, 7 Ex. 870; 22 L. J., Ex. 35), but now, if the agreement is one which could be enforced specifically, it will operate as a surrender. (*Ex parte Vitale, Re Young*, 47 L. T. 481; *Walsh v. Lonsdale*, 21 Ch. D. 9; 52 L. J., Ch. 2.) An agreement by a tenant to purchase the fee simple of the premises, subject to the ordinary implied condition that a good title be deduced, does not operate as a surrender of the existing tenancy until a good title is deduced. (*Doe v. Stanion*, 1 M. & W. 695; *Tarte v. Darby*, 15 M. & W. 601.) Neither is a surrender worked by an agreement for a lease to a stranger, or an agreement that the stranger shall be substituted for the tenant, unless it is in writing

and such writing satisfies the requirements for an express surrender, or unless the tenant quits and the stranger enters (*Stone v. Whiting*, 2 Stark. 235; *Taylor v. Chapman*, Peake, Add. Cas. 19), and each does so upon the express faith of that agreement; for a mere change of possession does not itself raise a presumption of a surrender, but only that the person in possession is an assignee or underlessee. (*Copeland v. Watts*, 1 Stark. 95; *Doe v. Wood*, 14 M. & W. 682.)

A new lease of part of the land demised operates as a surrender of that part (*Fish v. Champion*, 2 Rol. Ab. 498); but it in no respect affects the title to the other part. (*Earl of Carnarvon v. Villebois*, 13 M. & W. 342.) If there be two lessees and one take a new lease, this operates as a surrender of his moiety. (*Herreyong v. Goddard*, Dy. 46; *Shep. Touch.* 302.)

The new lease must be granted to the lessee in the same right as the old one; thus, acceptance by the lessee of a new lease in trust for another is not a surrender. Nor is the acceptance of the equitable interest in a new lease made to a third person. (*Gie v. Rider*, 1 Sid. 75.)

The creation of a new relationship in regard to the property inconsistent with the continuance of that of landlord and tenant, operates as a surrender, as where the lessee of a ferry becomes servant to the lessor, and accounts to him for the profits (*Peter v. Kendal*, 6 B. & C. 703), or the lessee for years of an advowson is presented by the lessor (*Gybson v. Searl*, Cro. Jac. 176), or the lessee for years accept for years an immediate grant of a rent-charge, or of common or of herbage issuing out of the lands demised. (*Mellows v. May*, Cro. Eliz. 874.) But a surrender will not be effected by the lessee's acceptance of an office collateral to the lands, as where the lessee of a park accepts the office of park-keeper, or the lessee of a manor accepts the office of steward. (*Gie v. Rider*, 1 Sid. 75.)

(2) Creation of new relationship.

Anything amounting to an abandonment of possession by the tenant, under circumstances from which it can be inferred that such abandonment was assented to by the landlord, or followed by the landlord actually or virtually taking possession, will amount to a surrender by operation of law. (*Furnicall v. Grove*, 30 L. J., C. P. 3; 8 C. B., N. S. 496; *Dodd v. Acklom*, 13 L. J., C. P. 11; 6 M. & Gr. 672; *Saint v. Pilley*, 44 L. J., Ex. 33; L. R., 10 Ex. 137; *Jones v. Bridgman*, 39 L. T. 500.)

(3) Yielding up and acceptance of possession.

It is essential to a surrender of this description that there should be both a *yielding up* by the tenant and an *acceptance* of possession by the landlord. Mere relinquishment of possession by the tenant is not sufficient, even if in pursuance of a parol agreement between the parties (*Thomson v. Wilson*, 2 Stark. 379), or a parol licence from the landlord to quit, as where, upon disputes arising between the parties the landlord said "you may quit when you please," and the tenant accordingly left a few days after. (*Mollett v. Brayne*, 2 Camp. 103.) This decision, however, rests upon the fact that the landlord did not accept possession. Had he done so the surrender would have been complete. (*Grimman v. Legge*, 8 B. & C. 325, *per* Bayley, J.; *Whitehead v. Clifford*, 5 Taunt. 518; *Gore v. Wright*, 8 A. & E. 118.)

Yielding up.

Although there must be an actual change in the possession of the premises, it is immaterial whether they are yielded up to the landlord himself (*Whitehead v. Clifford*, *supra*; *Grimman v. Legge*, *supra*; *Phené v. Popplewell*, 31 L. J., C. P. 235; 12 C. B., N. S. 334), or to a third person whom the landlord accepts as his tenant. (*Thomas v. Cook*, 2 B. & Ald. 119; *Johnstone v. Huddleston*, 4 B. & C. 939.)

Acceptance of possession.

The question of whether or not there has been an acceptance of possession by the landlord is one of fact. (*Reeve v. Bird*, 1 Cr. M. & R. 31.) Such acceptance, if disputed, must be made out by showing some act of the landlord after the tenant has vacated possession inconsistent with the tenancy still subsisting. (*Oastler v. Henderson*, 2 Q. B. D. 575; 46 L. J., Q. B. 607.)

Equivocal acts of dominion.

When the acts done are unequivocal and amount to taking actual physical possession, the surrender is complete. (*Phené v. Popplewell*, 12 C. B., N. S. 334.) But equivocal acts of dominion over the premises consistent with a subsisting tenancy may be referred to other motives than acceptance of possession. *Primâ facie*, the landlord has no interest in releasing the tenant from his bargain, but it will be in the interest of both parties to prevent dilapidations from leaving the premises vacant and uncared for. Therefore, it is not inconsistent with the continued possession of an empty house by the tenant that the landlord has put in a caretaker (*Bird v. Defonvielle*, 2 C. & K. 415), or entered thereon merely for the purpose of repairing, airing, drying, or keeping in proper condition (*Bessell*

v. *Landsberg*, 7 Q. B. 638; 14 L. J., Q. B. 355; *Griffith v. Hodges*, 1 C. & P. 419; *Smith v. Blackmore*, 1 Times L. R. 267), or has even occupied a portion of the premises for a short time by his servants and workpeople, but not with a view of taking possession (*Oastler v. Henderson*, 2 Q. B. D. 575; 46 L. J., Q. B. 607), or has put up bills or boards for the purpose of reletting the premises, if they are not in fact relet thereby. (*Redpath v. Roberts*, 3 Esp. 225; *Oastler v. Henderson*, *supra*; *Smith v. Blackmore*, *supra*.) But it is inconsistent with a subsisting tenancy that the landlord after entry has done that which would have been a trespass if the tenancy had continued, such as pulling down the premises (*Furnivall v. Grove*, 30 L. J., C. P. 3; 8 C. B., N. S. 496), or having entered, not intending to accept possession, changes his intention, as manifested by painting out the tenant's name. (*Phené v. Popplewell*, 31 L. J., C. P. 235; 12 C. B., N. S. 334.)

The following may be considered unequivocal acts of the landlord inconsistent with the continuance of the tenancy:—

(a) The creation of a new tenancy with a third person. Thus, where the tenant left the premises, and wrote to the landlord requesting him to relet, and the latter, without further communication, did relet, it was held to constitute a surrender. (*Nicholls v. Atherstone*, 16 L. J., Q. B. 371; 10 Q. B. 944.) So where the tenant having left, the landlord without any such request relet. (*Walls v. Atcheson*, 3 Bing. 462; *Reere v. Bird*, 1 Cr. M. & R. 31.)

(b) Resuming possession by acceptance of the keys as the symbol of possession, either upon a parol agreement that the tenancy is to cease (*Whitehead v. Clifford*, 5 Taunt. 518; *Grimman v. Legge*, 8 B. & C. 324; *Phené v. Popplewell*, 31 L. J., C. P. 235; 12 C. B., N. S. 334), or under circumstances from which the intention of the landlord to resume possession may be inferred (*Furnivall v. Grove*, 30 L. J., C. P. 3; 8 C. B., N. S. 496; *Smith v. Roberts*, 9 Times L. R. 77; *Moss v. James*, 47 L. J., Q. B. 160), will operate as a surrender. But there must be something to show that the landlord assents to the tenant's quitting, either by accepting the keys for the purpose of resuming, or actually resuming, possession of the premises: merely leaving the keys at the office of the landlord, who does not return them, is not sufficient. (*Cannan v. Hartley*, 19 L. J., C. P. 323; 9 C. B. 634.) He may not be able to

Unequivocal
acts.

Reletting the
premises.

Acceptance
of keys.

return them for want of knowledge of the whereabouts of the tenant. (*Smith v. Blackmore*, 1 Times L. R. 267.) Nor is he under any obligation to return them, even if he does know the tenant's whereabouts. And where the tenant sent the key with the intention of giving up possession, and then left the country, the fact that the landlord received the key and attempted unsuccessfully to relet the premises was held not to estop him from alleging that the tenancy was still subsisting; and it was further held that upon a reletting, the surrender only takes effect from the date of such reletting, and not from the time of the original receipt of the key. (*Oastler v. Henderson*, 46 L. J., Q. B. 607; 2 Q. B. D. 575; but on the latter point see *Phené v. Popplewell*, 31 L. J., C. P. 235; 12 C. B., N. S. 334.) Where a landlord applied to the tenant for leave to enter on the premises to do repairs ordered by a local authority, and the tenant quitted possession, sending the key to the landlord, saying the holding was determined, and the landlord kept the key, although refusing to accept the determination of the tenancy, did the repairs at great leisure, and did other repairs than those ordered, it was held to warrant the inference that the landlord had accepted the surrender. (*Smith v. Roberts*, 9 Times L. R. 77.)

Recognition
of tenancy of
third person
substituted
by tenant.

(c) By recognising as tenant a third person whom the old tenant has substituted in his place; as where two tenants under different lessors verbally agreed to exchange their holdings, and exchanged accordingly, with the assent of the agent of both lessors. (*Bees v. Williams*, 2 Cr. M. & R. 581.) So where a tenant, holding merely from year to year, underlets to a third person, or arranges that such third person shall be tenant in his place, and the change of possession takes place, the landlord assenting. (*Thomas v. Cook*, 2 B. & Ald. 119; *Stone v. Whiting*, 2 Stark. 235; and see *Cadle v. Moody*, 30 L. J., Ex. 385.) Such assent, when not express, is a question of fact for a jury (*Woodcock v. Nuth*, 8 Bing. 170), and may be inferred from the landlord giving the third person notice to pay the rent to him (*Harding v. Crethorn*, 1 Esp. 57), or giving in the name of the third person receipts for the rent (*Laurance v. Faux*, 2 F. & F. 435), or receiving the rent from the third person without giving any receipts. (*Woodcock v. Nuth*, *supra*.) But receipts are not conclusive, and, except in the case of a tenancy from year to

year, of little weight, since a landlord is willing to accept payment from whoever offers it. (*Copeland v. Watts*, 1 Stark. 95; *Doe v. Wood*, 14 M. & W. 682.) And where trade premises were let to A. & B., who were partners, and upon A. retiring B. admitted C. as a partner, receipts for rent given in the name of the new firm were not regarded as sufficient evidence of acceptance of a surrender of A.'s interest. (*Graham v. Whichelo*, 1 Cr. & M. 188.)

A surrender of part of the premises, by giving it up to the landlord, either with a proportionate reduction of the rent (*Holme v. Brunskill*, 47 L. J., C. P. 610; 3 Q. B. D. 495), or the substitution of other premises in lieu thereof (*Baynton v. Morgan*, 22 Q. B. D. 74; 58 L. J., Q. B. 139), does not necessarily create a surrender by operation of law of the original tenancy and the creation of a new tenancy of the part retained. But the attendant circumstances may be such as to furnish evidence for the jury that a new tenancy was intended of the part retained, and then there will be a surrender by operation of law. (*Jones v. Bridgman*, 39 L. T. 500.)

Surrender by yielding up part to landlord.

When a lease is surrendered it does not destroy the tenant's liability under his covenants for breaches of covenant and rent accrued (*Att. Gen. v. Cox*, 3 H. L. Cas. 240); but rent accruing, subsequent to the surrender, is lost. (*Grimman v. Legge*, 8 B. & C. 324.)

Effect of surrender

As under the Apportionment Act, 1870 (33 & 34 Vict. c. 35), rent now accrues *de die in diem*, the tenant will be liable for rent up to the actual day when the surrender takes effect.

A surrender merely destroys the estate as between surrenderor and surrenderee; it does not avoid or prejudice an underlease,—which can only be determined in the same way as if the estate had not been surrendered—(*Pleasant v. Benson*, 14 East, 234; *Doe v. Pyke*, 5 M. & S. 146; *Mellor v. Watkins*, L. R., 9 Q. B. 400; *David v. Sabin*, 68 L. T. 237), or destroy or prejudice derivative rights depending upon the continuance of the lease. (Co. Litt. 338 b; *Saint v. Pilley*, 44 L. J., Ex. 33; L. R., 10 Ex. 137; *Southwell v. Scotter*, 49 L. J., Ex. 356. See more fully as to its effect upon the right to remove fixtures mortgaged or sold by the tenant, *infra*, Chap. IX. s. 1; *London and Westminster Loan and Discount Co. v. Drake*, 28 L. J., C. P. 297; 6 C. B., N. S. 798.)

on underleases.

On the other hand, neither surrender nor merger destroys

the undertenant's liability under his lease or tenancy; for 8 & 9 Vict. c. 106, s. 9, provides that if a reversion expectant on a lease is surrendered or merges, the estate which confers as against the tenant the next vested right to the tenement shall be deemed the reversion for the purpose of preserving the incidents to, and obligations on, the reversion. (As to surrenders for renewal, see 4 Geo. 2, c. 28, s. 6; *ante*, p. 21.)

SECT. 5.—Disclaimer.

What amounts to a disclaimer.

A lease may be determined by disclaimer. (Bac. Ab. *Leases* (T. 2).) Any act amounting to a direct repudiation of the relation of landlord and tenant or a distinct claim to hold possession of the estate upon a ground wholly inconsistent with the existence of that relation amounts to a disclaimer. (*Doe v. Stanion*, 1 M. & W. 703, *per* Parke, B.; *Vivian v. Moat*, 16 Ch. D. 730; 50 L. J., Ch. 331, *per* Fry, J.)

Occurs practically only in case of yearly tenancy.

This species of determination is practically limited to tenancies from year to year, for a tenancy for a term of years certain cannot be determined by a verbal denial of the landlord's title (*Doe v. Wells*, 10 A. & E. 427; distinguishing *Doe v. Flynn*, 1 Cr. M. & R. 137), or by payment of rent to a third person (*Doe v. Parker*, Gow, 180), or the like. But even a lessee for years may incur a forfeiture by resorting to legal proceedings which claim or suppose a right to the freehold, or by resisting an action upon the lease by a denial of the landlord's title (1 Inst. 2336; Bac. Ab. (T. 2)), or even by assisting a hostile claimant by collusive acts, in fraud of his landlord. (*Doe v. Flynn*, *supra*.)

A tenancy from year to year is determinable by either a verbal or written disclaimer (*Doe v. Stanion*, 1 M. & W. 695, 702; *Doe v. Grubb*, 10 B. & C. 816); or, more strictly speaking, in an action by the landlord to recover possession of the premises, disclaimer furnishes an answer to the disclaiming party's assertion that he has had no notice to quit, inasmuch as it would be idle to prove such notice where the tenant has asserted that there is no longer any tenancy. (*Doe v. Wells*, 10 A. & E. 427, *per* Patteson, J.; *Doe v. Frowd*, 4 Bing. 560, *per* Best, C. J.; *Vivian v. Moat*, *supra*.)

To amount to a disclaimer, there must have been a renunciation by the party of the character of tenant either (1) by setting up a title in another, or (2) by claiming title in himself. (*Doe v. Cooper*, 1 M. & Gr. 139; 9 L. J., C. P. 231; *Jones v. Mills*, 10 C. B., N. S. 788; 31 L. J., C. P. 66.) Whether there was a denial of the landlord's title in point of fact is a question for the jury; whether such denial amounted in point of law to a disclaimer is for the determination of the judge. (*Doe v. Cooper*, *supra*, per Erskine, J.; *Doe v. Evans*, 9 M. & W. 48.)

Acts of
disclaimer.

A disavowal by the tenant, of the holding under the particular landlord, by words only, is sufficient. (*Doe v. Stanion*, 1 M. & W. 702.) But an omission to acknowledge the landlord as such by asking for proof of his title (*Doe v. Caudor*, 1 Cr. M. & R. 398), or refusing to pay rent until the owner under a disputed will is ascertained (*Doe v. Pasquali*, Peake, 259), or to pay more rent until the tenant "knows who is the right owner" (*Jones v. Mills*, 10 C. B., N. S. 788; 31 L. J., C. P. 66), or paying rent to a stranger in ignorance of the landlord's title (*ib.*), is not a disclaimer. On the other hand, a refusal to pay rent accompanied with "you are not my landlord" (*Doe v. Long*, 9 C. & P. 773), or with a statement "that his connection as tenant with the late J. G. [the applicant's ancestor] had ceased for several years, and that he then paid his rent to his brother" (*Doe v. Grubb*, 10 B. & C. 816), or "I have no rent for you; A. B. has ordered us to pay none" (*Doe v. Pittman*, 2 N. & M. 673), is evidence of a disclaimer. So where the tenancy was created by a tenant for life, a distinct refusal to recognize the remainderman as landlord was treated as a disclaimer. (*Doe v. Rollings*, 4 C. B. 188; 17 L. J., C. P. 268; *Doe v. Froud*, 4 Bing. 557.)

Setting up
title in
another.

A tenant does not claim title in himself by merely insisting upon an agreement for a lease (*Doe v. Cooper*, 1 M. & Gr. 139; 9 L. J., C. P. 231), or for the purchase of the premises. (*Doe v. Stanion*, 1 M. & W. 695.) But insisting upon a claim inconsistent with the ordinary relationship of landlord and tenant—as a denial by a yearly tenant of the landlord's right to raise the rent—will amount to a disclaimer. (*Virian v. Moat*, 16 Ch. D. 730; 50 L. J., Ch. 331.) Not so, however, a mere claim to continue to hold at a reduced rent. (*Hunt v. Allgood*, 30 L. J., C. P. 313; 10 C. B., N. S. 253.)

Claiming title
in himself.

A subsequent distress by the landlord waives a disclaimer.
(*Doe v. Williams*, 7 C. & P. 322.)

SECT. 6.—*Forfeiture.*

*Forfeiture in
case of condi-
tion broken.*

Subject to the statutory provisions for relief against forfeiture, which will be hereafter considered, a landlord may determine the lease or tenancy and re-enter for forfeiture when the tenant has broken a condition subject to the observance of which the lease was granted, either (a) expressly by the terms of the lease, or (b) impliedly from the very nature of the contract. An instance of a breach of the latter kind of condition occurs in the case of a disclaimer by a tenant for years, resulting from his doing something incompatible with the estate which he holds. (*Ante*, p. 356; 2 Bl. Com. 153.) The landlord's right to re-enter, for condition broken, is the same, whether the tenancy was created by deed or not. (*Doe v. Breach*, 6 Esp. 106; *Doe v. Amey*, 12 A. & E. 476; *Hayne v. Cummings*, 16 C. B., N. S. 421.)

*Condition
defined.*

Conditions either create, or enlarge, or defeat an estate, and are distinguished as conditions precedent and conditions subsequent. (Cruise, Dig., tit. 13, c. 1; 2 Bl. Com. 154.) As we are dealing with forfeitures, we need only consider conditions subsequent, which defeat the estate. In fact, this is the only kind of condition which is accurately described by the word. (Shep. Touch. 117.) This kind of condition is merely a proviso that on the doing of a particular act or the happening of a particular event, the term created by the instrument shall be defeated. (Shep. Touch. 117; Co. Litt. 201 a.)

Conditions annexed to terms of years are divisible into (1) conditions, the breach of which works a cesser of the term, and (2) conditions which give a right of re-entry. (3 Preston Abst. 397.) The older authorities considered that the former put an end to the estate as soon as the condition was broken, while the latter left the estate to continue until the landlord, by re-entry or other act, elected to determine it. (*Ib.*; Co. Litt. 201 a.) But the distinction no longer exists. Whatever the form of the condition, its breach does not, *ipso facto*, avoid the lease, but makes it voidable only. (*Infra*, p. 363.)

It is important, in construing an instrument not containing a formal proviso for re-entry, to distinguish between words which create a condition and words which only create a covenant and do not become a condition without the addition of a proviso for re-entry. (*Doe v. Phillips*, 2 Bing. 15.) In the absence of a condition for cesser or proviso for re-entry, the landlord cannot determine the lease for non-payment of rent, however much in arrear, or for breach of covenant, however vital. For the former he may distrain or sue, for the latter he may recover damages or obtain an injunction.

Conditions
and covenants
distinguished.

The words ordinarily used to make a condition are "upon condition," "so that," or "provided that." (Co. Litt. 203 a; Cruise, Dig., tit. 32, c. 25; *Simpson v. Titterell*, Cro. Eliz. 242.) *Proviso* implies a condition, unless subsequent words change it into a covenant; but it is a rule in provisos that where the proviso is that the lessee shall perform or not perform a thing, and no penalty is affixed, it is a condition, but if a penalty be affixed it is a covenant. (*Ib.*) Other words, such as "and if" or "but if," are conditional, but do not make a complete condition, unless words of cesser or of right to re-enter are added. (Shep. Touch. 122.) No precise form of words is necessary, but only an apparent intention to make the non-fulfilment of the stipulation defeat the estate (*Doe v. Watt*, 8 B. & C. 308, 315), although the words be not used as the words of the lessor, but as those of the lessee or indefinitely. (*Whichcot v. Fox*, Cro. Jac. 398; Cruise, Dig., tit. 32, c. 25, s. 9.) On the other hand, formal words of condition may, in accordance with the apparent intention of the parties, be construed as creating or qualifying a covenant. (Shep. Touch. 122; Co. Litt. 203 b; *Brookes v. Drysdale*, 3 C. P. D. 52; 37 L. T. 467.) In an agreement of demise it was "stipulated and conditioned" that the tenant should not assign, and this was held to create a condition (*Doe v. Watt, supra*); but where a tenant merely "agreed" that he would not underlet, it was held not to create a condition. (*Shaw v. Coffin*, 14 C. B., N. S. 372; *Crawley v. Price*, L. R., 10 Q. B. 302; 23 W. R. 874.)

Apt words
to create a
condition.

A proviso that the tenant shall pay a specified rent creates both a covenant and a condition (*Harrington v. Wise*, Cro. Eliz. 486); and an agreement to let at and under a specified rent, with a proviso for re-entry on breach of "any of the agreements herein contained,"

Strict proof
of breach
required.

includes a breach of the implied agreement to pay rent. (*Doe v. Kneller*, 4 C. & P. 3.) Strict proof of breach of a condition working a forfeiture is always required. (*Doe v. Robson*, 2 C. & P. 245; *Jackson v. Northampton Street Tramways Co.*, 55 L. T. 91.) For if the landlord make the condition, such as to render proof of a breach very difficult, the Court will not assist him. (*Doe v. Whitehead*, 8 A. & E. 571.)

Forfeiture
under proviso
for re-entry.

Leases usually contain a proviso for re-entry on breach of any of the covenants contained in the lease. Provisoes of this description, it is said, are to be construed like other contracts, according to the apparent intention of the parties (*Goodtitle v. Saville*, 16 East, 95; *Wooler v. Knott*, 45 L. J., Ex. 313, 884; 1 Ex. D. 124, 265), and not with the strictness of conditions at common law. (*Doe v. Elsam*, Mo. & M. 189.) On this point, however, there has been considerable conflict in the views of the judges. (See judgments in *Doe v. Ingleby*, 15 M. & W. 459; *Doe v. Sterens*, 3 B. & Ald. 303; *Wooler v. Knott*, *supra*.) The somewhat conflicting decisions (apart from the *dicta*) upon the point would seem reconcileable by the following propositions. (1) The proviso must be construed strictly and according to the letter to ascertain whether or not it was meant to include, and did incorporate, the covenant on breach whereof the right to re-enter is claimed. If it did, then (2) the question whether or not the covenant itself has been broken, is to be ascertained by reference to the rules which prevail in construing ordinary contracts between parties, and for that purpose the object and intent, as well as the actual words of the covenant, must be looked at. (*Croft v. Lumley*, 27 L. J., Q. B. 325, *per* Channell, B.)

For breach of
negative
covenants.

A proviso which seems to contemplate failure in the performance of affirmative covenants only, will not apply to breaches of negative covenants. (*West v. Dobb*, L. R., 5 Q. B. 460; 39 L. J., Q. B. 190.) So that a power to re-enter in the event of the lessee "failing or neglecting to perform any of the covenants on his part to be performed," will not sanction a re-entry for breach of a covenant not to assign without consent. (*Hyde v. Warden*, 3 Ex. D. 72; 47 L. J., Ex. 121.) An omission to do something is not within the words "do or cause to be done" (*Doe v. Sterens*, 3 B. & Ad. 303), and it has been held that breaches of a negative covenant are not covered by the words "make default in performance" (*Doe v. Marchetti*, 1 B. & Ad. 715;

see *Evans v. Davis*, 48 L. J., Ch. 223 ; 10 Ch. D. 747), for a negative cannot be performed. (Co. Litt. 303 b.) But a proviso for re-entry upon "breach of any of the covenants" would include negative covenants (*Wadham v. Postmaster-General*, L. R., 6 Q. B. 644 ; 40 L. J., Q. B. 310), and in a leading case, in reply to a question put by the House of Lords, nine judges were unanimously of opinion that a proviso for re-entry, "if the lessee shall make default of or in performance of all or any of the covenants, &c., which on his part are or ought to be observed, performed or kept," would apply to and embrace covenants not to do something, as well as covenants to do something (*Croft v. Lumley*, 6 H. L. Ca. 672 ; 27 L. J., Q. B. 321) ; and failure "to perform and keep" includes the non-observance of a negative covenant (*Timms v. Baker*, 49 L. T. 106) ; so does failure "to perform and observe." (*Barrow v. Isaacs*, [1891] 1 Q. B. 417 ; 60 L. J., Q. B. 179.)

We have already considered the usual covenants in leases, and what are breaches thereof. (*Ante*, Chap. V.) If the proviso for re-entry be insensible, the courts will not put a construction upon it to make it operative (*Doe v. Carew*, 2 Q. B. 217 ; 11 L. J., Q. B. 5) ; neither will the courts reject clear and positive words, unless upon clear evidence that they are contrary to the intention of the parties (*Doe v. Godwin*, 4 M. & S. 270) ; so that upon the construction of a proviso for re-entry on breach of the covenants "hereinafter" contained, it was held to be restricted to subsequent covenants, although there were none to which it could apply, since such covenants might have been omitted through mistake, or struck out of the draft. (*Ib.*) And where an agreement for an underlease stipulated that it should contain the covenants mentioned in the head-lease, and that the premises should not be underlet, a breach of the clause against underletting was held not to create a forfeiture under the proviso for re-entry in the head-lease, which contained no clause against under-letting. (*Crawley v. Price*, L. R., 10 Q. B. 302 ; 33 L. T. 203.) But a proviso for re-entry on breach of "any of the covenants," is not restricted by an imperfect enumeration of them. (*Doe v. Jepson*, 3 B. & Ad. 402.)

A proviso in the lease of a public-house for re-entry on breach, amongst other covenants, of one not to do any act that "could or might affect, lessen, or make void either or any of the licences," was held not to give a right of re-

Construction
of provisoes.

entry after two unindorsed convictions under the Licensing Acts against the lessee. (*Wooler v. Knott*, 1 Ex. D. 124, 265; 45 L. J., Ex. 313, 884.) On the other hand, a covenant in a lease of a public-house not to do any act whereby the licence "may be forfeited, or the renewal thereof withheld," was held to be broken by two convictions which were indorsed on the licence. (*Harman v. Rees*, 65 L. T. 255; 60 L. J., Q. B. 628.)

Proviso for re-entry for acts other than breaches of covenant, as bankruptcy, assignment, &c.

The proviso is usually extended beyond breaches of covenant, so as to include other acts and omissions of the tenant, such as bankruptcy (*Roe v. Galliers*, 2 T. R. 133), insolvency (*Doe v. Rees*, 4 Bing. N. C. 384), or composition with creditors. An assignment of all a debtor's property to a trustee, upon trust, to divide as far as it will go, for the benefit of his creditors, is not a composition. (*Reg. v. Cooban*, 56 L. J., M. C. 33.) A proviso for re-entry, if the lessee be "duly found and declared a bankrupt," does not apply to an invalid adjudication of bankruptcy (*Doe v. Ingleby*, 15 M. & W. 465), and one for re-entry if "the lessee, his executors, administrators, or assigns" should become bankrupt, was held to refer only to the bankruptcy of the person for the time being possessed of the term, and not to include the bankruptcy of the original lessee after he had assigned the term (*Smith v. Gronow*, [1891] 2 Q. B. 394; 65 L. T. 117); but the bankruptcy of a surviving executor of a tenant is within a proviso "if the lessee, his executors, administrators, or assigns shall become bankrupt," &c. (*Doe v. David*, 1 Cr., M. & R. 405.) A proviso for re-entry if the tenant should "file a petition in liquidation" has been held to include the presentation by the tenant of a bankruptcy petition under the Bankruptcy Act, 1883. (*Ex parte Gould, Re Walker*, 13 Q. B. D. 454; 51 L. T. 368.) Seizure by the sheriff under an extent at the suit of the Crown was held to be within a proviso for re-entry in case the term thereby granted should be "extended or taken in execution." (*Rex v. Topping*, M'Clel. & Y. 544.) If the re-entry is to accrue, "in case no sufficient distress can be found on the premises," every part of the premises must be searched (*Rees v. King*, Forrest, 19; 2 B. & B. 514; *Price v. Worwood*, 28 L. J., Ex. 329; 4 H. & N. 512; *Wheeler v. Sterenson*, 6 H. & N. 155; 30 L. J., Ex. 46); and unripe growing crops may amount to a sufficient distress. (*Ex parte Arnison*, L. R., 3 Ex. 56; 37 L. J., Ex. 57.)

An act or default, whether in terms defeating the estate or giving a right of re-entry, does not absolutely determine the lease, but makes it voidable at the election of the landlord alone, and not of the tenant, who may not take advantage of his own wrong. (*Rede v. Farr*, 6 M. & S. 121.) And this is so, though the proviso run that the term shall "cease" or "cease and determine" (*Reid v. Parsons*, 2 Chit. 247; *Arnsby v. Woodward*, 6 B. & C. 519; *Davenport v. Regina*, 47 L. J., P. C. 8; 3 App. Cas. 115), or that the "lease shall be void to all intents and purposes" (*Doe v. Banks*, 4 B. & Ald. 401; *James v. Young*, 53 L. J., Ch. 793, 800; 27 Ch. D. 652; *Osborne v. Morgan*, 57 L. J., P. C. 52); or shall be "null and void." (*Doe v. Birch*, 1 M. & W. 402; *Dakin v. Cope*, 2 Russ. 170; *Bousser v. Colby*, 1 Hare, 109; *Hughes v. Palmer*, 34 L. J., C. P. 279; 19 C. B., N. S. 393.) And the landlord must by some unequivocal act evince his intention to avoid it (*Roberts v. Darcy*, 4 B. & Ad. 664); such as commencing proceedings in ejectment (*Jones v. Carter*, 15 M. & W. 718), creating a new tenancy with a third person in possession (*Baylis v. Le Gros*, 4 C. B., N. S. 537), or the like. But once having elected, the landlord cannot draw back.

Forfeiture makes lease voidable, not void.

Re-entry upon a forfeiture of the lease does not extinguish the liability of the tenant in respect of breaches of covenant that had accrued at the time of forfeiture. (*Hartshorne v. Watson*, 4 Bing. N. C. 178.)

Effect of re-entry on tenant's liability.

By forfeiture of the original lease all underleases and other derivative interests will be defeated as much as by effluxion of time, although no voluntary act of the lessee would have that effect. (Coote, L. & T. 375.)

Effect upon underleases.

Forfeiture is not favoured in law (*Goodright v. Davids*, Cowp. 803), and if after breach of a covenant or condition working a forfeiture the landlord, with notice thereof, do any act which admits the continuance of the tenancy at a later period, he waives his right to take advantage of a forfeiture prior to the date down to which he recognizes the tenancy as continuing. (*Ward v. Day*, 33 L. J., Q. B. 3, 254; *Pellatt v. Boosey*, 31 L. J., C. P. 281; and see *Dumpor's case*, 1 Smith, L. C. 43, 9th ed.)

Waiver of forfeiture.

A lessor by simply witnessing the breach of covenant, but doing no act amounting to a recognition of a continued tenancy, does not waive a forfeiture (*Doe v. Allen*, 3 Taunt. 78; *Ward v. Ward*, 33 L. J., Q. B. 254, *per Williams, J.*;

(1) Lying by not a waiver.

Bracebridge v. Buckley, 2 Price, 200); even though the tenant, with the lessor's knowledge, expend money on the premises while the breach is going on. (*Perry v. Davis*, 3 C. B., N. S. 769; *Doe v. Brindley*, 12 Moore, 37.)

(2) Acceptance of rent.

Acceptance of rent accruing due after a forfeiture, and with notice of the forfeiture, operates as an affirmance of the lease and a waiver of the forfeiture. (*Pennant's Case*, 3 Co. Rep. 64; *Arnsby v. Woodcard*, 6 B. & C. 519.) This has been held in the case of a covenant against underletting (*Goodright v. Davids*, Cowp. 803; *Walrond v. Hawkins*, L. R., 10 C. P. 342; 44 L. J., C. P. 116); assigning (see *Dowell v. Dew*, 1 Y. & C., Ch. C. 345; 12 L. J., Ch. 158); becoming insolvent or bankrupt (*Doe v. Rees*, 4 Bing. N. C. 384); becoming unable to go on with the management of the premises (*Doe v. Pritchard*, 5 B. & Ad. 765); failing to occupy the premises (*Davenport v. Regina*, 3 App. Cas. 115; 47 L. J., P. C. 9); or carry on a business (*Griffin v. Tomkins*, 42 L. T. 359); and in all other cases in which the act done is a breach once and for all.

If money tendered as rent is accepted, but under protest that the lessor accepts it, not as rent under the lease, but as compensation for the premises, or "without prejudice" to his right to insist upon the forfeiture, the protest is inoperative, and the acceptance has the ordinary effect. (*Croft v. Lumley*, 27 L. J., Q. B. 321; 6 H. L. Ca. 672, per Williams, J.; *Davenport v. Regina*, *supra*; *Lancashire Waggon Co. v. Nuttall*, 40 L. T. 291; *Griffin v. Tomkins*, 42 L. T. 359; *Strong v. Stringer*, 61 L. T. 470.)

Provided the rent is paid in satisfaction of that reserved by the lease, it is immaterial whether it is paid by the lessee himself (*Doe v. Rees*, 4 Bing. N. C. 384) or by the person in possession of the premises with his consent. (*Doe v. Pritchard*, 5 B. & Ad. 765; *Pellatt v. Boosey*, 31 L. J., C. P. 281.)

No waiver, however, results from acceptance of rent due at the time of the forfeiture. (*Price v. Worwood*, 4 H. & N. 512; 28 L. J., Ex. 329.)

(3) Suing for or demanding rent.

Suing for rent becoming due after the forfeiture has the same operation by way of waiver as acceptance of rent. (*Dendy v. Nicholl*, 4 C. B., N. S. 376; 27 L. J., C. P. 220.) And an unqualified demand for such rent would seem to have the same effect. (*Doe v. Birch*, 1 M. & W. 408.)

A distress for rent operates as a waiver not only up to the day on which the rent distrained for was due (*Cotesworth v. Spokes*, 30 L. J., C. P. 220; 10 C. B., N. S. 103), but up to the day of the distress. (*Kirkland v. Briancourt*, 6 Times L. R. 441.) It stands in this respect upon a different footing to waiver by acceptance of rent, the reason being the common law rule that there cannot be a distress after the termination of the tenancy, and therefore the act of distraining acknowledges a then existing tenancy. (*Pennant's Case*, 3 Co. Rep. 64; *Ward v. Day*, 4 B. & S. 336; 33 L. J., Q. B. 11, *per* Crompton, J.) And although the statute 8 Anne, c. 14, ss. 6, 7, gives the landlord the right to distress within six months after the determination of the tenancy, it applies only to a determination by effluxion of time or notice to quit, and not by forfeiture. (*Ante*, p. 295; *Doe v. Williams*, 7 C. & P. 322; *Grimwood v. Moss*, L. R., 7 C. P. 360; 41 L. J., C. P. 239, *per* Willes, J.) But where the right of re-entry exists only in case no sufficient distress be found upon the premises, taking an insufficient distress for rent is not a waiver, since it is a necessary act to prove the landlord's title to re-enter. (*Breuer v. Eaton*, 3 Doug. 230; *Shepherd v. Berger*, [1891] 1 Q. B. 597; 60 L. J., Q. B. 395; 64 L. T. 435.) Neither is a distress a waiver of a forfeiture accruing subsequently to the distress, but during the time the bailiff continues in possession thereof. (*Doe v. Johnson*, 1 Stark. 411.)

(4) Distress for rent.

Other acts besides those above noticed have been held to waive a forfeiture, *e. g.*, referring to the lessee as "tenant" in a receipt for bygone rent (*Green's case*, Cro. Eliz. 3; *Doe v. Birch*, 1 M. & W. 402, 406); giving a notice to quit (*Doe v. Miller*, 2 C. & P. 348); bringing an action for the breaches of covenant relied on as creating a forfeiture, and in the pleadings stating that the breaches occurred "during the existence of the term" (*Pellatt v. Boosey*, 31 L. J., C. P. 281); and even claiming, in an action of ejectment, alternative relief based upon the recognition of a subsisting tenancy. (*Evans v. Davis*, 10 Ch. D. 747; 48 L. J., Ch. 223.)

Other acts of waiver.

There is no waiver unless the landlord have knowledge or notice of the breach. (*Pennant's case*, 3 Co. Rep. 64; *Roe v. Harrison*, 2 T. R. 425.) The knowledge of the agent who receives the rent is not sufficient, unless he has authority to create a new tenancy. (*Doe v. Birch*, 1 M. & W. 402.) Thus, where a lessor was too ill to attend to

Knowledge of breach essential to waiver.

business, the receipt of rent by his son, who collected the rents, and who alone had notice of the forfeiture, was held no waiver. (*Ib.*)

No waiver
after election
to determine
tenancy.

There can be no waiver after an unequivocal act of the landlord showing his election to determine the tenancy. Thus, the service of a writ in an action of ejectment for forfeiture is an election on the part of the landlord to determine the tenancy, and nothing done afterwards will amount to a waiver of the forfeiture, or set up the lease again. (*Jones v. Carter*, 15 M. & W. 718; *Grimwood v. Moss*, L. R., 7 C. P. 360; 41 L. J., C. P. 239; *Toleman v. Portbury*, L. R., 6 Q. B. 245; 7 Q. B. 344; 40 L. J., Q. B. 125; 41 L. J., Q. B. 98; but see *Evans v. Davis*, 10 Ch. D. 747; 48 L. J., Ch. 223, *ante*, p. 365.) Where, however, after an action of ejectment has been commenced for breaches of covenant, the landlord receives rent accrued after the forfeiture, this may be treated as evidence of a new tenancy on the terms of the old lease. (*Evans v. Wyatt*, 43 L. T. 176.) But a distress made after a landlord has commenced an action of ejectment would appear to be a simple act of trespass. (*Grimwood v. Moss*, *supra*, *per* Willes, J.)

Waiver only
of past
breaches.

Waiver of a right of re-entry resulting from any of the before-mentioned acts only applies to breaches actually incurred, and does not preclude re-entry for subsequent breaches (*Doe v. Bliss*, 4 Taunt. 735); or for continuing acts of forfeiture, as in the case of the non-observance of a covenant to work mines, or keep in repair (*Doe v. Durnford*, 2 Cr. & J. 667; *Doe v. Jones*, 5 Ex. 498; 19 L. J., Ex. 405; *Coward v. Gregory*, L. R., 2 C. P. 153; 36 L. J., C. P. 1), to keep insured (*Doe v. Peck*, 1 B. & Ad. 428; *Doe v. Gladwin*, 6 Q. B. 953; 14 L. J., Q. B. 189; *Price v. Worwood*, 4 H. & N. 512; 28 L. J., Ex. 329), to cultivate land in a particular manner (*Coatsworth v. Johnson*, 54 L. T. 520), or not to use the premises for a particular purpose. (*Doe v. Woodbridge*, 9 B. & C. 376; but see *ante*, p. 235.) But where the breach, though continuing, creates or is accompanied with the creation of a tenancy in a third person, the waiver operates throughout the continuance of that tenancy. (*Griffin v. Tomkins*, 42 L. T. 359.) Thus, waiver of a breach of covenant against underletting continues during the tenancy of the person to whom the premises are underlet (*Walrond v. Hawkins*, 44 L. J., C. P. 116; L. R., 10 C. P. 342), and in the case of a cove-

nant against carrying on business on the premises, receipt of rent after knowledge that a third person was in possession carrying on business, was held to be a waiver during the tenancy which the landlord must be presumed to have known existed. (*Griffin v. Tomkins, supra.*)

We have seen (*ante*, p. 194) that in the case of covenants to repair generally and to repair after a specified notice, giving the notice required by the second covenant will waive the right to re-enter for forfeiture under the general covenant. But acceptance of rent which becomes due while a notice is running, is no waiver of a subsequent forfeiture caused by non-compliance with such notice (*Doe v. Brindley*, 4 B. & Ad. 84); and the rule is the same whether the notice given is that required by the covenant, or to satisfy the requirements of the 14th section of the Conveyancing Act, 1881. (*Cronin v. Rogers*, Cab. & E. 348, *per* Denman, J.) Even acceptance of rent due after the expiration of the notice will not defeat the landlord's right to recover possession if the premises continue subsequently unrepaired. (*Fryett v. Jeffreys*, 1 Esp. 393.)

An implied waiver of the kind we have considered waived only the particular breach, it did not waive the condition itself, which, at common law, would be destroyed by waiver. (*Doe v. Pritchard*, 5 B. & Ad. 771, *per* Taunton, J.) But an express waiver destroyed the condition itself. (*Dumpor's case*, 4 Co. Rep. 119.) To obviate the inconvenience arising from this rule, it was enacted by 23 & 24 Vict. c. 38, s. 6, that where any actual waiver of the benefit of any covenant or condition in any lease on the part of any lessor, or his heirs, executors, administrators, or assigns, shall be proved to have taken place, after the passing of that Act, in any one particular instance, such actual waiver shall not be assumed or deemed to extend to any instance, or any breach of covenant or condition other than that to which such waiver shall specifically relate, nor to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect shall appear.

Express
waiver.

Restricted to
the breaches
to which it
specifically
relates.

In like manner, a licence to commit a breach of covenant or condition which formerly destroyed the right of re-entry has been restricted in its effect by statute, so that every such licence shall, unless otherwise expressed, extend only to the permission actually given, or to any specific breach of any proviso or covenant, made or to be made, or to the actual matter thereby specifically authorized to be done,

Effect of a
licence to
commit a
breach.

but not so as to prevent any proceeding for any subsequent breach unless otherwise specified in such licence; and, except as to the particular matter authorized, the right of re-entry remains. (22 & 23 Vict. c. 35, s. 1.)

Forfeiture for non-payment of rent.

Forfeiture for non-payment of rent and relief against such forfeiture stand upon a slightly different footing to forfeiture under any other stipulation contained in the lease.

Common law preliminaries to re-entry.

The common law formalities required before the landlord could take advantage of a clause for re-entry for non-payment of rent were so numerous and troublesome, that it was practically impossible to enforce the right. For in such a case, to create a forfeiture there must be a demand, by the landlord or his agent, of the precise rent due and no more, upon the precise day when it is due and payable, at a convenient time before sunset, and upon the land, at the most notorious place of it, or at the place, if any, appointed for payment. (*Duppa v. Mayo*, 1 Wms. Saund. 287; *Adam's Eject.* 120.)

Demand dispensed with by express stipulation,

But the parties may consent to dispense with such demand as the law would otherwise require; and in modern leases the proviso is usually framed for re-entry, if the rent be unpaid for a certain number of days after it is due, "although no legal or formal demand be made." After the lapse of the time specified, the landlord is entitled to recover in ejectment without any demand of the rent, and notwithstanding there may be sufficient distress on the premises to countervail the arrears. (*Doe v. Masters*, 2 B. & C. 490; *Goodright v. Cator*, 2 Doug. 486.) And where the proviso was for re-entry in case of default "in payment of the rent or any part thereof, within twenty-one days after the same shall become due (being demanded)," it was considered that this dispensed with a demand with common law formalities and substituted an ordinary demand for payment, which must, however, be made after the expiration of the twenty-one days. (*Phillips v. Bridge*, L. R., 9 C. P. 48; 43 L. J., C. P. 13; but as to the first part of the proposition, see *Doe v. Alexander*, 2 M. & S. 525.)

and by stipulation as to insufficient distress;

Sometimes the proviso adds the condition that there shall be no sufficient distress on the premises. Where the proviso was for re-entry "if and whenever" any quarter's rent or any part thereof should be in arrear for twenty-one days, and no sufficient distress could be levied for the same, whether legally demanded or not, and the landlord

distraigned all the goods on the premises for three quarters' rent, and after sale of the distress, which was sufficient to satisfy any one quarter, but left more than a quarter's rent unsatisfied, it was held that the landlord was entitled to recover possession. (*Shepherd v. Berger*, [1891] 1 Q. B. 597; 60 L. J., Q. B. 395; 64 L. T. 435; 39 W. R. 330.) Had the words "and whenever" been omitted, and the clause run "if any one quarter's rent shall be in arrear," &c., the proviso might have been construed as referring to the time the distress was put in, so as to create a single cause of forfeiture on that day, and as there was sufficient distress to satisfy any one quarter's rent the case would not have come within the proviso. (*Ib.*, *per cur.*)

Even where the proviso does not in terms dispense with a demand, it is now dispensed with by statute under certain circumstances. The Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), by sect. 210 (which re-enacted with slight variation an earlier statute of Geo. 2), provides that in all cases between landlord and tenant when one half-year's rent is in arrear, and the landlord or lessor hath right by law to re-enter for the non-payment thereof, such landlord or lessor may without any formal demand or re-entry serve a writ in ejectment, and in case of judgment against the defendant for non-appearance, if it appear to the Court by affidavit, or be proved upon the trial, in case the defendant appears, that half-a-year's rent was due before the writ was served, and no sufficient distress to be found on the premises countervailing the arrears then due, and that the lessor had power to re-enter, then the lessor shall recover judgment and execution in the same manner as if the rent in arrear had been legally demanded and a re-entry made.

by statute,
where rent
half-a-year in
arrear and
distress
insufficient.

The section applies only as between landlord and tenant. But the assignee of a lessee, whether by way of mortgage or otherwise (*Doe d. Whitfield v. Roe*, 3 Taunt. 402; *Williams v. Bosanquet*, 1 Brod. & B. 238), and a mere underlessee (*Doe v. Byron*, 1 C. B. 623), are "tenants."

Who are
"tenants."

A right by law to re-enter means a right of re-entry reserved by the express terms of the lease (*Brewer v. Eaton*, 3 Doug. 230), in respect of the non-payment of half-a-year's rent. (*Doe d. Dixon v. Roe*, 7 C. B. 134). And it must be a right to re-enter and determine the lease, not a mere right to enter and hold the premises until the arrears are paid. (*Doe v. Bowditch*, 8 Q. B. 973; 15 L. J., Q. B. 266.)

Right by law
to re-enter.

No formal demand necessary.

No demand is necessary if half-a-year's rent is in arrear and there is no sufficient distress, notwithstanding the proviso is expressed to be for re-entry if the rent is in arrear, being lawfully demanded. (*Doe v. Alexander*, 2 M. & S. 525; *Doe v. Wilson*, 5 B. & Ald. 364.)

One half-year's rent at the least must be in arrear when writ issued.

One half-year's rent at the least must be in arrear (*Hill v. Kempshall*, 7 C. B. 975) at the time of the service of the writ (*Cotesworth v. Spokes*, 30 L. J., C. P. 220; 10 C. B., N. S. 103), and even due before the writ is sued out. (*Doe d. Gretton v. Roe*, 4 C. B. 576.) If there is more than half-a-year's rent in arrear, but the landlord distrain and realize sufficient to reduce it to less than half-a-year's rent, he cannot recover possession under the section. (*Cotesworth v. Spokes*, *supra*.) If more than one half-year's rent is in arrear, the case is within the section (*Doe v. Alexander*, 2 M. & S. 525), unless there is sufficient available distress to be found on the demised premises "countervailing the arrears due" (*Doe v. Wandlass*, 7 T. R. 117), *i.e.* all the arrears, and not merely half-a-year's rent, where more is due. (*Cross v. Jordan*, 8 Ex. 149, overruling *Doe d. Powell v. Roe*, 9 Dowl. 548; *Cole*, Ejec. 416.)

Insufficiency of distress must be clearly established.

The insufficiency of the distress must be clearly established (*Doe v. Wandlass*, *supra*), taking into account everything which is distrainable, notwithstanding, as in the case of growing crops, it may not be immediately saleable. (*Ex parte Arnison*, L. R., 3 Ex. 58; 37 L. J., Ex. 57.) Every part of the premises must be searched (*Rees v. King*, Forrest, 19, cited in *Smith v. Jersey*, 2 Brod. & B. 514; and see *Price v. Worwood*, 4 H. & N. 512), after the last day for saving the forfeiture, and before the writ is issued, or at all events served. (*Doe d. Dixon v. Roe*, 7 C. B. 134.) If a broker going to distrain and using reasonable diligence would not find sufficient (*Doe v. Franks*, 2 C. & K. 678), or if the tenant by locking up the premises prevents the goods from being found (*Doe v. Dyson*, M. & M. 77; *Doe d. Cox v. Roe*, 5 D. & L. 272; *Romilly v. Fycroft*, 4 W. R. 26), there is an insufficiency. And where four houses were demised at one rent, and two were deserted by the lessee, and the lessor to prevent their being a nuisance put in a caretaker and afterwards distrained the goods of the persons in possession of the other two houses, which being insufficient he brought ejectment; it was held that there was evidence of an insufficient distress without any search of the two houses that had been deserted. (*Wheeler v. Stevenson*, 6 H. & N. 155; 30 L. J., Ex. 46.)

In an action of ejectment for forfeiture for non-payment of rent, the common law Courts would set aside the forfeiture and stay proceedings, upon payment of the debt and costs at any time before execution executed (see *Roe v. Davis*, 7 East, 363), and a tenant might at any time apply to and obtain relief from a Court of equity. (*Bowser v. Colby*, 1 Hare, 125.) To compel the tenant to seek his relief within six months after execution executed, the statute of Geo. II. was passed (*Doe v. Lewis*, 2 Burr. 619), which is re-enacted in the sections of the Common Law Procedure Act, 1852, next referred to.

Relief against forfeiture for non-payment of rent,

Sect. 210 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), enacts that in case the tenant shall permit or suffer judgment to be had and recovered and execution to be executed thereon without paying rents and arrears and full costs, and without proceeding for relief in equity (see below, 23 & 24 Vict. c. 126, s. 1) within six calendar months after such execution executed, then the lessee shall be barred from all relief or remedy in law or equity, other than by bringing error for reversal of such judgment, and the landlord shall thenceforth hold the premises discharged from the lease.

to be applied for within six months after execution,

The application formerly required to be made was to a Court of equity for an injunction (see *Hare v. Elms*, 41 W. R. 297; 58 L. T. 223); and sect. 211 of the Common Law Procedure Act, 1852, enacted that no injunction should be granted or continued, unless, within forty days after the landlord's defence was filed, the tenant paid into Court the full arrears of rent and costs.

and only granted on payment of rent and costs.

Now, under the Common Law Procedure Act, 1863 (23 & 24 Vict. c. 126), s. 1, the application may be made by summons to a judge in chambers, who may give relief in a summary manner, but subject to appeal, and subject to the same terms as to payment of rent, costs, and otherwise as in the Court of Chancery; and if the lessee shall upon such proceedings be relieved, he shall hold the demised lands according to the lease thereof without any new lease. Where the plaintiff obtained judgment in an action of ejectment, but was deprived of his costs of the action, the defendant was held entitled to relief upon payment of all rent due, and the costs of the application for relief. (*Croft v. London and County Banking Co.*, 14 Q. B. D. 347; 54 L. J., Q. B. 277.)

Application by summons in chambers.

Granting relief, even when the application is made

within six months, is discretionary, and will be refused if there has been unreasonable delay in making the application, particularly if the landlord has entered into an agreement to let the premises to another person. (*Stanhope v. Haworth*, 3 Times L. R. 34.) When the application for relief is made by an underlessee, he must bring the lessee or his assignee before the Court as well as the original landlord. (*Hare v. Elms*, 41 W. R. 297; [1893] 1 Q. B. 604.)

Stay of proceedings on payment of rent and costs before trial.

Sect. 212 of the Common Law Procedure Act, 1852, provides that, if at any time *before trial* the tenant pay or tender all rent, together with the costs, the proceedings in ejectment shall be discontinued. In such case, also, no new lease is necessary.

The law relating to re-entry, or forfeiture, or relief in case of non-payment of rent is not affected by the Conveyancing Acts. (44 & 45 Vict. c. 41, s. 14 (8); *Scott v. Matthew Brown & Co.*, 51 L. T. 746.)

Relief against forfeiture in other cases before the Conveyancing Act.

Before the passing of the Conveyancing Act, 1881, the only other statutory provisions for relief, besides those in the case of non-payment of rent, were provisions (repealed by the Conveyancing Act) for relief against forfeiture for breaches of covenant to insure. And in modern times, the Courts of equity would not grant relief against forfeiture in any other cases, except on the ground of mistake, accident, or fraud. (*Gregory v. Wilson*, 9 Hare, 689; *Bracebridge v. Buckley*, 2 Price, 200; *Reynolds v. Pitt*, *ib.* 212, n.; *Peachy v. Duke of Somerset*, 2 Wh. & Tu. L. C. in Eq. 1245 *et seq.*, 6th ed.)

Restrictions on and relief against forfeiture under Conveyancing Acts.

By the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 14, as amended by the Conveyancing Act, 1892 (55 & 56 Vict. c. 13), the power of the Court to relieve against forfeiture has been extended to forfeitures of all kinds, with the exceptions therein specified, and in cases in which the Court may so relieve, the lessor is prohibited from enforcing his right of re-entry by action or otherwise until certain antecedent formalities have been complied with. The excepted breaches against which relief is not granted are: (1) of a covenant or condition against assigning, underletting, or parting with the possession of the land leased; (2) of a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest where the lease is of (a) agricultural or pastoral land; (b) mines or minerals; (c) a public-house or beer-shop; (d) a dwelling-house with furniture and

chattels, not being fixtures; (e) or property in respect of which the personal qualifications of the tenant are of importance; (3) of a like condition in any other case after the expiration of one year from the date of the bankruptcy or taking in execution, provided the lessee's interest be not sold within such year; (4) of a covenant in a mining lease to allow the lessor to inspect books, workings, &c. This seems to be the effect of the exceptions upon exceptions contained in the sections of the two statutes, which with the decisions thereon are hereinafter set out.

A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach. (44 & 45 Vict. c. 41, s. 14, sub-s. 1.)

Forfeiture not enforceable until after notice.

The notice must be in writing and may be addressed and served as mentioned in sect. 67 of the Act. A notice addressed to the original lessee and all others whom it may concern, and served on the person in occupation is sufficiently addressed and validly served. (*Cronin v. Rogers*, Cab. & E. 348.)

Nature of the notice.

The Act postpones the right of the lessor to re-enter until he has served the requisite notice (*Creswell v. Davidson*, 56 L. T. 811), which must be given whether the re-entry is intended to be enforced by action or by simply re-entering on vacant premises. It should specify (1) the covenant alleged to be broken; (2) the breaches complained of, in general terms; and (3) require the breach to be remedied, and (4) the lessee to make money compensation where such compensation is required. But it is not necessary to demand money compensation when it is not required. (*Skinner's Co. v. Knight*, [1891] 2 Q. B. 542; 60 L. J., Q. B. 629; *Lock v. Pearce*, [1892] 2 Ch. 328; 40 W. R. 508; on appeal, 41 W. R. 369; the earlier cases of *North London Freehold Land Co. v. Jacques*, 49 L. T. 659; and *Greenfield v. Hanson*, 2 Times L. R. 876, being overruled.)

What compensation.

It was decided that under this section the lessor was only entitled by way of compensation to the damages, if any, caused by the breach, and not to the costs of his solicitor and surveyor. (*Skinner's Co. v. Knight*, *supra*; but see *Bridge v. Quick*, 67 L. T. 54; 61 L. J., Q. B. 375.) To remedy this it was enacted, that a lessor shall be entitled to recover as a debt due to him from a lessee, and in addition to damages (if any) all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and surveyor or valuer, or otherwise, in reference to any breach giving rise to a right of re-entry or forfeiture which, at the request of the lessee, is waived by the lessor by writing under his hand, or from which the lessee is relieved, under the provisions of the Conveyancing and Law of Property Act, 1881, or of this Act. (55 & 56 Vict. c. 13, s. 2, sub-s. 1.)

Relief against forfeiture.

Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief; and the Court may grant or refuse relief, as the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court, in the circumstances of each case, thinks fit. (44 & 45 Vict. c. 41, s. 14, sub-s. 2.)

The relief must be sought while the landlord is still "proceeding" to enforce his right, and cannot be granted after he has re-entered (*Rogers v. Rice*, [1892] 2 Ch. 170; 61 L. J., Ch. 573; *Quilter v. Mapleson*, 9 Q. B. D. 672), unless he re-enters pending the application. (*Lock v. Pearce*, [1892] 2 Ch. 328; 67 L. T. 164; on appeal, 41 W. R. 369.)

Where the landlord is proceeding by way of ejectment in the High Court, relief may be granted at the trial, though not claimed in the pleadings (*Mitchison v. Thomson*, Cab. & E. 72), or an application for relief may be made by summons in chambers. (See *Bond v. Freke*, W. N. 1884, p. 47; 28 Sol. Jour. 300.) The terms upon which relief will be granted must vary according to circumstances. (See *Bridge v. Quick*, 67 L. T. 54.)

Court in the Act means the High Court. (44 & 45 Vict. c. 41, s. 2 (xviii).) And where the lessor is proceeding to recover possession in the county court, the lessee in order to obtain relief must either apply to remove the action to the High Court, or commence independent proceedings for relief. Such proceedings should be commenced in the Chancery Division, and cannot be by originating summons but must be by action. (Sect. 69; *Lock v. Pearce*, 41 W. R. 369.)

The discretion of the Court to grant or refuse relief is absolute, and where the landlord had actually re-entered without giving any notice, the Court refused the relief in an action by the tenant for wrongful re-entry (*Scott v. Matthew Brown & Co.*, 51 L. T. 746), but in an action by the landlord to recover possession, the failure to give a proper notice is a bar to the action. (*Greenfield v. Hanson*, 2 Times L. R. 876.) In *Mitchison v. Thomson* (Cab. & E. 72), an action of ejectment for non-repair, relief was granted, notwithstanding the premises were very dilapidated.

In the case of a relief against forfeiture under the C. L. P. Act, 1852, it is provided that the lessee shall have, hold, and enjoy the demised lands according to the lease without any new lease. (*Ante*, p. 371.) No corresponding provision is contained in the Conveyancing Acts, and as the landlord, by electing to determine the lease, puts an end to it, the effect of relief would seem to be to make the tenant one from year to year on the terms of the old lease. (See *West v. Rogers*, 4 Times L. R. 229.)

It was held, upon the construction of the Conveyancing Act, 1881, that sect. 14 applied only where there was privity between the parties, and did not give an underlessee a right to relief as against an original lessor seeking to re-enter, and *a fortiori* that it did not give such a right to an underlessee of part of the premises. (*Burt v. Gray*, [1891] 2 Q. B. 98.) To remedy this, the Act of 1892 has provided that where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease, the Court may, on application by any person claiming as underlessee any estate or interest in the property comprised in the lease or any part thereof, either in the lessor's action (if any), or in any action brought by such person for that purpose, make an order vesting for the whole term of the lease or

Remedy of underlessee where superior lessor seeking to re-enter.

any less term the property comprised in the lease, or any part thereof, in any person entitled as underlessee to any estate or interest in such property upon such conditions, as to the execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security, or otherwise, as the Court in the circumstances of each case shall think fit, but in no case shall any such underlessee be entitled to require a lease to be granted to him for any longer term than he had under his original sub-lease. (55 & 56 Vict. c. 13, s. 4.)

Acts apply
to all leases,

The Acts are retrospective and universal, and apply to leases made either before or after their commencement, and shall have effect notwithstanding any stipulation to the contrary. (44 & 45 Vict. c. 41, s. 14, sub-s. 9.)

even if in
pursuance of
a statute,

They apply also, although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of any Act of Parliament. (*Ib.*, sub-s. 4.)

or proviso in
form of a
limitation.

And for the purposes of the Acts, a lease limited to continue as long only as the lessee abstains from committing a breach of covenant shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach. (*Ib.*, sub-s. 5.)

Lease, &c.,
defined.

Sect. 14 of the Conveyancing Act, 1881, defining the terms used, enacted that, for the purposes of the section, a lease includes an original or derivative underlease, also a grant at a fee farm rent, or securing a rent by condition; and a lessee includes an original or derivative underlessee, and the heirs, executors, administrators, and assigns of a lessee, also a grantee under such a grant as aforesaid, his heirs and assigns; and a lessor includes an original or derivative underlessor, and the heirs, executors, administrators, and assigns of a lessor, also a grantor as aforesaid, and his heirs and assigns. (44 & 45 Vict. c. 41, s. 14, sub-s. 3.)

It was decided that lease in this section did not include an agreement for a lease, unless it was one of which a Court of equity would grant specific performance. (*Swain v. Ayres*, 21 Q. B. D. 289; *ante*, p. 133.) This was a negative decision, and it is put into an affirmative form by the amending Act of 1892, which enacts that, in sect. 14 of the Conveyancing and Law of Property Act, 1881, as amended by this Act, and in this Act, "lease" shall also

include an agreement for a lease where the lessee has become entitled to have his lease granted, and "underlease" shall also include an agreement for an underlease where the underlessee has become entitled to have his underlease granted, and in this Act "underlessee" shall include any person deriving title under or from an underlessee. (55 & 56 Vict. c. 13, s. 5, and see comment, *ante*, p. 133.)

Certain causes of forfeiture are, however, excluded from relief. The Conveyancing Act, 1881, provides that it shall not extend—

Covenants in respect of which no relief granted.

- (i.) To a covenant or condition against the assigning, under-letting, parting with the possession, or disposing of the land leased; or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest; or
- (ii.) In case of a mining lease, to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines or other things, or to enter or inspect the mine or the workings thereof. (44 & 45 Vict. c. 41, s. 14, sub-s. 6.)

This has been amended in the following terms:—"Sub-section six of section fourteen of the Conveyancing and Law of Property Act, 1881, is to apply to a condition for forfeiture on bankruptcy of the lessee, or on taking in execution of the lessee's interest only after the expiration of one year from the date of the bankruptcy, or taking in execution, and provided the lessee's interest be not sold within such one year, but in case the lessee's interest be sold within such one year, sub-section six shall cease to be applicable thereto. (55 & 56 Vict. c. 13, s. 2, sub-s. 2.)

"Sub-section two of this section is not to apply to any lease of—

- "(a.) Agricultural or pastoral land:
- "(b.) Mines or minerals:
- "(c.) A house used or intended to be used as a public-house or beershop:
- "(d.) A house let as a dwelling-house, with the use of any furniture, books, works of art, or other chattels not being in the nature of fixtures:
- "(e.) Any property with respect to which the personal qualifications of the tenant are of importance for the preservation of the value or character of the

property, or on the ground of neighbourhood to the lessor, or to any person holding under him.”
(*Ib.*, sub.-s. 3.)

We have endeavoured to state shortly the effect of the above sub-sections. (*Ante*, p. 372.)

SECT. 7.—*Notice to quit.*

Notice to quit.

Right to give, incident to yearly tenancy ;

but nature of may be controlled by contract.

A tenancy from year to year, and other tenancies of the like nature, such as half-yearly, quarterly, or monthly tenancies, may be determined by a notice to quit given by either landlord or tenant. The right to so determine it is an inseparable incident to the tenancy, and a stipulation in an express tenancy from year to year, by which either party professes to deprive himself of the right to give notice to quit is void, because it is repugnant to the nature of the tenancy. (*Doe v. Broune*, 8 East, 165; *Broune v. Warner*, 14 Ves. 156, 409; *Wood v. Beard*, 2 Ex. D. 30; 46 L. J., Q. B. 100; *Roberts v. Tregaskis*, 38 L. T. 176; *Cheshire Lines Committee v. Lewis*, 50 L. J., C. P. 121; 44 L. T. 293.) Though as we have seen (*ante*, p. 94), such a stipulation may alter the tenancy from a yearly tenancy into one for the life of the lessee, or for the entire interest of the lessor, except a nominal reversion. (See *Re King's Leaseholds*, L. R., 16 Eq. 521; *Kusel v. Watson*, 26 W. R. 653; 38 L. T. 604; 11 Ch. D. 129; 48 L. J., Ch. 413.)

The notice generally required by common law to be given in the case of a yearly tenancy, whether of a house or of land, is a half-year's notice, ending on the last day of some year of the tenancy. (*Right v. Darby*, 1 T. R. 159; *Bridges v. Potts*, 33 L. J., C. P. 338; 17 C. B., N. S. 314.) The last day of the year means the day *from* which the tenancy commenced. Thus, in a letting from the 25th of March, the notice must expire on the 25th of March. But parties who are free to contract may agree that the tenancy shall determine by whatever notice they think fit (*Re Threlfall*, 16 Ch. D. 274; 50 L. J., Ch. 318, *per* Cotton, L. J.), either as to length (*Doe v. Raffan*, 6 Esp. 4; *Doe v. Baker*, 8 Taunt. 241), or time of expiration (*Bridges v. Potts*, 33 L. J., C. P. 343; 17 C. B., N. S. 314), and may even stipulate that upon the happening of a certain event the tenant may quit without notice. (*Bethell v. Blencowe*,

3 M. & G. 119.) Where a stipulation merely provides by what notice or in what manner one party may determine the tenancy, the other party can only determine it by the regular common law notice to quit.

To enable a landlord to claim double value in case the tenant holds over, the notice to quit must be in writing. (*Infra*, Chap. IX., s. 5.) But for the purposes of an ejectment, a notice to quit may be verbal unless a written one is stipulated for (*Timmins v. Rowlinson*, 3 Burr. 1603; *Doe v. Crick*, 5 Esp. 196), even in the case of a corporation. (*Roe v. Pierce*, 2 Camp. 96.) And a valid verbal notice is not waived by a subsequent invalid written notice to quit. (*Doe v. Crick*, *supra*.)

Verbal notice.

The general practice is, however, to give a written notice. When in writing it need not be attested. If attested, the witness need not be called to prove it. (17 & 18 Vict. c. 125, s. 26.) A written notice need not be signed. (*Carleton v. Herbert*, 14 W. R. 772.)

Written notice.

Notwithstanding the death of either lessor or lessee the tenancy still continues, and is only dissolved by a proper notice to quit. (*Doe v. Porter*, 3 T. R. 13; *R. v. Inhabitants of Stone*, 6 T. R. 295; *Maddon v. White*, 2 T. R. 159.) And so in the case of an assignment by either landlord or tenant.

Notice necessary, notwithstanding death of either party.

Whenever there has been an actual agreement as to the length of notice, the stipulated notice must be given. (*Doe v. Raffan*, 6 Esp. 4.)

Length of notice—

In the absence of stipulation local custom may regulate the length of notice required, but there must be strong evidence of the custom. (*Roe v. Charnock*, Peake, 5.)

In the case of a tenancy from year to year, unless by statute, agreement, or local custom, some other period of notice is fixed, it must, as we have seen (*ante*, p. 378), be given a half-year at least before the expiration of some current year of the tenancy. (*Right v. Darby*, 1 T. R. 159; *Doe v. Snowden*, 2 W. Bl. 1225.) The half-year must be not merely six calendar months, but, unless the tenancy commenced on one of the usual feast days, a full period of 182 days. (*Anon.*, Dyer, 345.) If the tenancy commenced on one of the ordinary feast or quarter days, the notice must be from feast day to feast day, given on or before the quarter day next but one before that on which it is to determine. Such a notice is sufficient though less than a full half-year (*Roe d. Durant v. Doe*, 6 Bing. 574 ;

in yearly tenancies ;

Howard v. Wansley, 6 Esp. 53), and is required though more than a full half-year. (*Morgan v. Davies*, 3 C. P. D. 260; 26 W. R. 816.) If the parties stipulate for a "six months'" notice, six lunar months will be sufficient. (*Rogers v. Kingston-upon-Hull Dock Co.*, 34 L. J., Ch. 165; and see *Simpson v. Margetson*, 17 L. J., Q. B. 81; 11 Q. B. 23; *Hutton v. Brown*, 45 L. T. 343); but if there is a stipulation for six calendar months' notice, a shorter one is insufficient. (*Quartermaine v. Selby*, 5 Times L. R. 223.) The fact of the rent being reserved quarterly does not dispense with the necessity for a half-year's notice to quit. (*Shirley v. Newman*, 1 Esp. 266.)

in tenancies
less than
yearly;

The length of notice required to determine a shorter tenancy than one from year to year, is left in some doubt by the authorities. (*Ante*, p. 12.) In the case of a weekly tenancy a week's notice to quit would seem sufficient and has been thought necessary. (*Jones v. Mills*, 31 L. J., C. P. 66; 10 C. B., N. S. 788; *Cheshire Lines Committee v. Lewis*, 50 L. J., C. P. 128, *per Brett*, L. J.) On the other hand, it has been held that a weekly tenancy mechanically comes to an end every week (*Sandford v. Clarke*, 57 L. J., Q. B. 507; 21 Q. B. D. 398); but this is opposed to earlier authority. (*Reg. v. Thornton*, 2 E. & B. 788; 29 L. J., M. C. 162.) When the premises are taken by the month a month's notice only is required. (*Doe v. Hazell*, 1 Esp. 94.)

under
Agricultural
Holdings
Act, 1883.

As to tenancies within the provisions of the Agricultural Holdings Act, 1883, where a half-year's notice, expiring with a year of tenancy, is by law necessary and sufficient for determination of a tenancy from year to year, in the case of any such tenancy under a contract of tenancy made either before or after the commencement of the Act, a year's notice so expiring shall, by virtue of the Act, be necessary and sufficient for the same, unless the landlord and tenant, by writing under their hands, agree that the section shall not apply, in which case a half-year's notice shall continue to be sufficient; but nothing in the section shall extend to the case where the tenant is adjudged bankrupt, or has filed a petition for composition or arrangement with his creditors. (46 & 47 Vict. c. 61, s. 33.) The section does not apply where there is an express stipulation as to the length of notice, but only where no notice being stipulated for a half-year's notice is requisite by implication of law. (*Barlow v. Teal*, 15 Q. B. D. 501; 54 L. J., Q. B. 564; 34 W. R.

54; *Wilkinson v. Calvert*, 3 C. P. D. 360; 47 L. J., C. P. 679.)

When the notice to quit is for one of the usual quarter days it is sufficient if given *on* the quarter day next but one before that for which it is given; thus a notice on the 29th of September to quit at lady-day following is sufficient. (*Doe v. Wrightman*, 4 Esp. 6; *Doe v. Green*, *ib.*, 198.) In any other case the time is computed exclusive of the day on which the notice is given. (*Quartermaine v. Selby*, 6 Times L. R. 223; Leake, 729, 3rd ed.)

How time
computed.

The notice to quit, whatever its length, must, in the absence of stipulation to the contrary, expire on the last day of the first or some other year of the tenancy (*Doe v. Donoran*, 1 Taunt. 555), and as the last day of a year continues up to midnight a notice to quit at noon on that day would be invalid. (*Page v. More*, 15 Q. B. 684.) But the parties may stipulate for a notice expiring at any time. (*Bridges v. Potts*, 17 C. B., N. S. 314; 33 L. J., C. P. 338.) Thus an agreement for the lease of mines for twenty-one years which, not being under seal, only created at law a tenancy from year to year, contained a stipulation that the lessee was to be at liberty at any time thereafter to determine the agreement on giving six months' notice, it was held that, consistently with the apparent intention of the parties, notice might be given expiring at any time of the year. (*Ib.*)

When to
expire.

*See Queen's
Club Gardens
Estates Ltd
v. Synnall
1924 148
117*

In the case of an express tenancy from year to year the Courts will not construe a stipulation as authorizing a notice expiring otherwise than on the last day of a year of the tenancy, unless the language and intention is clear. Thus, on a letting from year to year, the tenant to quit at a quarter's notice, the quarter must expire with a year of the tenancy. (*Doe v. Donovan*, 1 Taunt. 555.) But the stipulation as to notice may alter what would otherwise have been a yearly tenancy into a less one; and an agreement by which the tenant is "always to be subject to quit at three months' notice" creates a quarterly tenancy determinable at the end of any quarter. (*Kemp v. Derrett*, 3 Camp. 510; *Brown v. Burtinshaw*, 7 D. & Ry. 603.) So an agreement that the tenant should hold until one of the parties should give to the other six calendar months' notice in writing was held not to create a yearly tenancy, but one determinable at the end of any half-year from the com-

mencement of the tenancy. (*Doe v. Grafton*, 18 Q. B. 496; 21 L. J., Q. B. 276.)

When
tenancy arises
on holding
over.

Whenever a tenancy comes to an end either by effluxion of time or determination of the lessor's title and the tenant holds over without stipulation on the point, notice to quit must be given with reference to the commencement of the original demise to him. (*Kelly v. Patterson*, L. R., 9 C. P. 681; 43 L. J., C. P. 320.) Thus, if a tenant for life execute a lease which determines upon his death, and the remainderman receives rent from the lessee (thus affirming the tenancy), the notice must expire on the last day of some year of tenancy computed from the original entry. (*Roe v. Ward*, 1 H. Bl. 97; *Doe v. Weller*, 7 T. R. 478.) So where the tenant holds over after the expiration of the lease (*Doe v. Samuel*, 5 Esp. 173), even when the original term is for a broken period not ending on the day when the tenancy commenced. (*Berrey v. Lindley*, 3 M. & Gr. 498; 11 L. J., C. P. 27; *Doe v. Dobell*, 1 Q. B. 806; 10 L. J., Q. B. 242.) And so where in the case of a yearly tenancy a new tenant is, with the assent of the landlord, substituted on a date other than the end of the year, but the tenancy is in continuation of the old tenancy. (*Humphreys v. Franks*, 18 C. B., N. S. 323; *Walker v. Godé*, 6 H. & N. 594; 30 L. J., Ex. 172.) But when the original tenant sublets, and the underlessee enters at a different time of year to the commencement of the original tenancy, and holds over, the notice to quit must be given with reference to the entry of the underlessee, and not with reference to the commencement of the original tenancy. (*Kelly v. Patterson*, L. R., 9 C. P. 681; 43 L. J., C. P. 320; *Doe v. Lines*, 11 Q. B. 402; 17 L. J., Q. B. 108.) And where a mortgagee upon whom a lease created by his mortgagor is not binding, asserts his title paramount by demanding payment of rent to himself, to which demand the tenant assents, the yearly tenancy thus created (*ante*, p. 54) commences from the date from which rent was first paid. (*Corbett v. Plowden*, 25 Ch. D. 678; 54 L. J., Ch. 109.)

When the
entry is
between the
quarter days.

Although a tenancy, in the absence of payment of rent, or other means of defining the commencement, is to be considered as commencing on the day of entry (*Doe v. Matthews*, 11 C. B. 675; *Kemp v. Derrett*, 3 Camp. 510), yet if a tenant enter in a broken quarter, and pay rent for

such broken quarter, and afterwards pay rent from quarter to quarter, the tenancy, so far as concerns the notice to quit, will be held to commence from the quarter day after he first entered (*Doe v. Stapleton*, 3 C. & P. 275; *Doe v. Johnson*, 6 Esp. 10; *Doe v. Grafton*, 18 Q. B. 496; 21 L. J., Q. B. 276; *Adams*, Eject. 107, 4th ed.); so if no rent is to be paid for the broken quarter. (*Sandill v. Franklin*, L. R., 10 C. P. 377; 44 L. J., C. P. 216; 23 W. R. 473.)

When the tenant (as is usual in the case of a farm) has entered on different parts of the premises at different times, the notice must be given with reference to the entry on the principal subject of the demise (*Doe v. Snowden*, 2 W. Bl. 1224; *Doe v. Spence*, 6 East, 120; *Doe v. Watkins*, 7 East, 551; *Rutland v. Doe*, 12 M. & W. 370), and the jury must decide which is the principal part. (*Doe v. Howard*, 11 East, 498; *Doe v. Hughes*, 7 M. & W. 139.)

When entry
at different
times.

When a question arises as to the date of the commencement of the tenancy, it is one for the jury to decide. (*Walker v. Godé*, 30 L. J., Ex. 172; 6 H. & N. 594.) If the date is uncertain and the tenant, upon being applied to, inform his landlord that his tenancy began on a certain day, notice to quit accordingly is good; nor may the tenant afterwards show that it commenced on a different day. (*Doe v. Lambly*, 2 Esp. 635.)

When com-
mencement
of tenancy
uncertain.

A notice to quit on a given date is in itself no evidence in favour of the person giving it, that the date specified is that of the commencement of the tenancy (*Doe v. Calvert*, 2 Camp. 388); but, if served personally on a party who reads it over, or has it read over to him in the presence of the person serving it, and makes no objection on the ground of a wrong date, this is *prima facie* evidence of the commencement of the tenancy (*Thomas v. Thomas*, 2 Camp. 647; *Doe v. Forster*, 13 East, 405; *Doe v. Biggs*, 2 Taunt. 109), which may, however, be rebutted. (*Oakapple v. Copous*, 4 T. R. 361). Where there is no doubt as to the commencement of the tenancy, a notice to quit on the wrong day, given by the one party and assented to by the other, is not binding upon the party giving it, and does not determine the tenancy. (*Doe v. Milcard*, 3 M. & W. 331; *Johnstone v. Hudlestone*, 4 B. & C. 922.)

Except in the case of agricultural holdings, a landlord cannot give a notice to quit as to part of premises demised together at an entire rent (*Prince v. Evans*, 29 L. T., N. S.

Notice must be
for the whole.

835; *Doe v. Archer*, 14 East, 245; *Doe v. Church*, 3 Camp. 71), unless a power to do so is given by the lease. But the Courts lean towards construing a notice as one for the whole rather than a void notice for part. Thus, a notice to quit "Town Barton, &c.," was held sufficient for other lands held therewith though having distinct names (*Doe v. Archer, supra*), and "the house, lands, and premises with the appurtenances you rent of me," was held to include tithes. (*Doe v. Church, supra*.) Where a lessor sells portion of the premises and apports the rent, but the tenant does no act recognising the purchaser as landlord, a notice to quit by the purchaser as to the part purchased by him is invalid. (*Prince v. Evans, supra*.)

Exception in the case of agricultural holdings.

The Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), however, in the case of tenancies from year to year to which the Act relates allows the landlord, for the purposes therein specified, to resume possession of part only of the land, and for that purpose to give notice to quit as to part only; but the tenant, by notice to the landlord, may accept and treat it as a notice to quit the entire holding. (Sect. 41.) If he does not do so, he is entitled to a proportionate reduction of rent, both in respect of the land withdrawn from him and of the depreciation to him of the value of the residue. (*Ibid.*)

Form and contents of notice,

The form of the notice is immaterial provided it indicate in substance, and with reasonable clearness and certainty, an intention on the part of the person giving it to determine the existing tenancy at a certain time. (*Gardner v. Ingram*, 61 L. T. 729.) Any trifling inaccuracy, which could not mislead the party to whom it is given, will not invalidate a notice. Thus, a mistake as to the parish, when the tenant held only one farm (*Doe v. Wilkinson*, 12 A. & E. 742), calling the premises by the wrong name (*Doe v. —*, 4 Esp. 185), putting a wrong year as that in which the notice was to end (*Doe v. Kightley*, 7 T. R. 63), addressing the notice to the tenant by a wrong christian name, and he did not return it (*Doe v. Spiller*, 6 Esp. 70), have been held not to invalidate a notice, for the Courts listen with reluctance to objections to the form of notice. (*Doe v. Archer*, 14 East, 245.)

as to the premises;

The notice should indicate the premises to be given up. But "all the property you hold of me," or a similar general description is sufficient.

as to the day of quitting,

The notice need not specify the particular day on which

the tenant is to quit. But upon a reasonable construction it must indicate an intention to determine the tenancy on the day on which it may lawfully be determined by notice. (*Goode v. Howells*, 4 M. & W. 198.) A notice "to quit" generally, or to quit "forthwith," would be bad. (*Ib.*) A notice by the tenant to quit "as soon as by law he might," appears to be good. (*Ib.*, per Lord Abinger.) So is a notice to quit "at the expiration of the present year's tenancy." (*Doe v. Timothy*, 2 C. & K. 351.) A notice to quit "at the expiration of the current year of the tenancy, which shall expire next after the end of one half-year from the date thereof," is sufficient, and when there is any doubt as to the commencement of the tenancy, it should be so expressed. (*Doe v. Butler*, 2 Esp. 589; 2 Camp. 258, n.; *Doe v. Smith*, 5 A. & E. 350.) When a specific day is mentioned, care should be taken that it is the correct one, otherwise the notice will be invalid, though served in time for the right day. (*Doe v. Lea*, 11 East, 312.) Where a tenant held from Martinmas to Martinmas, a notice given to the tenant on the 21st of October to quit on the 13th of May then next, or on such other day or time as the current year for which he held should expire, it was held insufficient, for it would not be good for May, and the current year would expire on the 11th of November, a few days after the notice. (*Doe v. Morphett*, 7 Q. B. 577; 14 L. J., Q. B. 345; *Mills v. Goff*, 14 M. & W. 72.) But a notice for two alternative days is good, if either of them is the correct one; thus, where it was uncertain whether a tenancy commenced on new or old Lady-Day, a notice to quit on the 25th of March or the 8th of April was held sufficient. (*Doe v. Wrightman*, 4 Esp. 6; and see *Doe v. Vince*, 2 Camp. 256.)

The notice need not state to whom possession is to be given up (*Doe v. Foster*, 3 C. B. 215), but if it state it in- giving an alternative.
correctly it may invalidate the notice. (*Doe v. Fairclough*, 6 M. & S. 40.) It must be imperative to quit without an alternative. (*Adams*, Eject. 95.) Thus, if the landlord say, "If you are dissatisfied, you may give up your farm," it is not sufficiently positive. (*Per Cotton*, L. J., *Ahearn v. Bellman*, 48 L. J., Ex. 685; 4 Ex. D. 212.) So, a notice that upon the happening of a certain contingency which may or may not happen, the landlord will re-enter (*Muskett v. Hill*, 5 Bing. N. C. 711), or a notice to the tenant that he has to quit or agree to pay double rent, is

bad. But "I desire you to quit, or I shall *insist on* double rent," was held a good notice, and not regarded as offering an alternative. (*Doe v. Jackson*, 1 Doug. 175; *Doe v. Goldwin*, 2 Q. B. 143.) And a notice may be optional and yet good; thus, a notice to quit, in two paragraphs, the first, a notice to quit on a given day, the second, "I hereby further give you notice that should you wish to retain possession after the date before mentioned, the annual rental will be [an increased sum], payable quarterly in advance," was held, as to the first paragraph, a good notice to quit determining the tenancy; and as to the second paragraph, an offer of a new tenancy, but that such offer not having been accepted, the landlord was entitled to recover possession. (*Ahearn v. Bellman*, *supra*.) A notice by the tenant must equally denote an absolute intention to give up the premises at the lawful time. (*Goode v. Howells*, 4 M. & W. 202.) "Kindly take notice that I intend to surrender to you the tenancy of this house on or before" a given date, was held not to be a notice to quit, but a notice of the tenant's intention to surrender, which he could only do with his landlord's consent. (*Gardner v. Ingram*, 61 L. T. 729.)

By whom
given.

Notice on behalf of the landlord should be given by himself or his agent. A mere receiver of rents, as such, has no implied authority to give a notice to quit (*per Parke, J.*, *Doe v. Walters*, 10 B. & C. 633), but an agent to receive rent and to let has. (*Doe v. Mizem*, 2 M. & Rob. 56; *Doe v. Robinson*, 3 Bing. N. C. 677; *Erne v. Armstrong*, 20 W. R. 370.) And he may give the notice in his own name without purporting to give it as agent. (*Jones v. Phipps*, L. R., 3 Q. B. 567; 37 L. J., Q. B. 198.) The steward of a corporation may give notice without any authority under seal. (*Roe v. Pierce*, 2 Camp. 96.) If the agent at the time of giving notice have no authority, a recognition and adoption of the notice by the landlord in time for it to begin to operate will make it good, but not a subsequent adoption of it. (*Doe v. Walters*, 10 B. & C. 626; *Doe v. Goldwin*, 2 Q. B. 143.) A notice given by one of several joint tenants (*Doe v. Summersett*, 1 B. & Ad. 135), or partners (*Doe v. Hulme*, 2 Man. & Ry. 433), or the authorized agent of one of them (*Doe v. Hughes*, 7 M. & W. 139), is sufficient for the whole. But a notice by one of several tenants in common is only valid as to his own share, except so far as he is

also acting as the agent of the other persons interested. (Adams, Eject. 88; Coote, L. & T. 365.) When the reversion continues in the landlord, a notice to quit by him alone is sufficient, notwithstanding some of the receipts have been given in the names of himself and trade partners. (*Doe v. Baker*, 8 Taunt. 241.)

Notice on behalf of the tenant must in like manner be given by the person in whom the tenancy is for the time being vested, or his agent.

The notice on behalf of one party may be given either to the other party or to his duly authorized agent. Thus, the landlord may give the notice to the solicitor and agent of the tenant who pays the rent (*Doe v. Ongley*, 10 C. B. 25, 34); and the tenant may give the notice to the solicitor of the landlord who has the general management of the property (*Papillon v. Brunton*, 29 L. J., Ex. 265; 5 H. & N. 518), but not to a mere collector of rents. (*Pearse v. Boulter*, 2 F. & F. 133.)

To whom
given.

It is not necessary that the notice to quit should be addressed to anyone, provided it reach the proper person. (*Doe v. Wrightman*, 4 Esp. 5.) If addressed, it should be to the other immediate party to the relationship. Thus, a notice by the landlord should be addressed to the immediate tenant and not to a mere under-tenant (*Pleasant v. Benson*, 14 East, 234); and a notice by a tenant to his immediate landlord, and not to a superior landlord. A notice to a corporation should be addressed to the corporation itself, and not to one of its officers. (*Doe v. Woodman*, 8 East, 228.)

How ad-
dressed.

When in writing, the notice may be served upon the tenant personally, or, in the case of joint tenants, upon one of them (*Doe v. Watkins*, 7 East, 551), or it may be left at his dwelling-house, whether upon the demised premises or not, with his wife, servant, or other person, whose duty it would be to deliver it to the tenant; but in that case the nature and contents should be explained at the time (*Jones v. Marsh*, 4 T. R. 464; *Doe v. Lucas*, 5 Esp. 153; *Tanham v. Nicholson*, L. R., 5 H. L. 561; *Liddy v. Kennedy*, L. R., 5 H. L. 134; 20 W. R. 150), and it will be sufficient though the tenant be not informed of it until within half-a-year of its expiration. (*Doe v. Dunbar*, Mo. & M. 10.) Merely leaving the notice on the premises without delivering it to anyone is not sufficient (*Doe v. Lucas*, *supra*), unless it be proved to have come to the tenant's hands in

Service of.

due time. (*Alford v. Vickery*, C. & M. 280.) Service upon an under-tenant is not sufficient, but service upon the person in possession will be good, as he is *prima facie* the assignee or agent of the tenant until an under-tenancy be proved (*Doe v. Williams*, 6 B. & C. 41; *Doe v. Murless*, 6 M. & S. 110; *Roe v. Street*, 2 A. & E. 329); and where a tenant is dead, service upon his widow in possession is good in the absence of evidence of probate or administration. (*Rees v. Perrott*, 4 C. & P. 230; *Sweeny v. Sweeny*, Ir. R., 10 C. L. 375.) Notice may be served through the post; and where a notice was sent through the post to the place of business of the landlord's agent, and reached there after the agent left, but during business hours, on the last day for giving notice, it was held sufficient. (*Papillon v. Brunton*, 5 H. & N. 518; 29 L. J., Ex. 265.) A notice posted so as to be delivered in due time in the ordinary course of the post, will be presumed to have been so delivered and be sufficient. (*Gresham House Estate Co. v. Rossa Grande Gold Mining Co.*, W. N. (1870) 119.) Service in the case of a corporation may be upon one of its officers, though the notice must be addressed to the corporation. (*Doe v. Woodman*, 8 East, 228.)

Proof of
notice.

Where, in the usual course of business, the person employed to serve a notice to quit indorses upon a duplicate copy a memorandum of the fact and time of service, this copy will be admissible after his death to prove the service (*Doe v. Turford*, 3 B. & Ad. 890; *Stapylton v. Clough*, 2 E. & B. 933; 23 L. J., Q. B. 5), without notice to produce the original being given. (*Doe v. Somerton*, 7 Q. B. 58; 14 L. J., Q. B. 210.)

Waiver of
notice.

A notice to quit may be withdrawn by mutual consent (*Tayleur v. Wildin*, L. R., 3 Ex. 303; 37 L. J., Ex. 173), or its enforcement may be waived in various other ways. If the landlord distrain for (*Zouch v. Willingale*, 1 H. Bl. 311), or receive (*Goodright v. Cordwent*, 6 T. R. 219; *Doe v. Batten*, Cowp. 243), rent due after the expiration of the notice, it is a waiver of the right to enforce the notice to quit. But not so if the rent was due before the expiration of the notice. Merely demanding subsequent rent without its being paid is not necessarily a waiver (*Blyth v. Dennett*, 22 L. J., C. P. 79; 13 C. B. 178); and in a case where the rent was usually paid at a banker's, and the banker without authority received rent after the expiration of a notice to quit, this was held no waiver. (*Doe v. Calvert*,

2 Camp. 387.) A second notice to quit is generally, though not necessarily, a waiver of a former one. (*Doe v. Palmer*, 16 East, 53; *Doe v. Humphreys*, 2 East, 237.) A notice "to quit the premises which you hold of me, your term therein having long since expired," is a demand of possession, and not a second notice to quit. (*Doe v. Inglis*, 3 Taunt. 54.) So is a notice, after the expiration of the tenancy, to quit in fourteen days, "otherwise I shall require double value." (*Doe v. Steel*, 3 Camp. 117.) And a second notice to quit given by way of precaution after the expiration of the first, and upon the foundation of which an action of ejectment has been commenced, is not a waiver. (*Doe v. Humphreys*, 2 East, 237.) The tenant's holding over after the expiration of the notice is not a waiver, without evidence of a renewal of the tenancy (*Jenner v. Clegg*, 1 M. & Rob. 213; *Gray v. Bompas*, 11 C. B., N. S. 520); nor will a mere indulgence granted to the tenant operate as a waiver. Thus, where the landlord being about to sell the premises gave the tenant notice, but promised not to turn him out unless they were sold, it was held that the tenant's having held under this promise was no waiver. (*Whiteacre v. Symonds*, 10 East, 13; *Doe v. Crick*, 5 Esp. 196.)

In most cases "waiver" of a notice to quit is a short expression, meaning that a new tenancy has been created. (*Blyth v. Dennett*, 22 L. J., C. P. 79; *per Jervis*, C. J.) When an effectual notice to quit is allowed to run its course, it determines the tenancy. It cannot then be waived or withdrawn; and where its enforcement is waived, this does not operate as a continuance of the old tenancy, but creates a new tenancy commencing from its expiration.

Effect of
waiver when
notice
expired.

The case of *Tayleur v. Wildin* (*supra*) is usually cited as an authority for the proposition that the mere service of a valid notice to quit operates so as to put an end to a tenancy from year to year on the date on which it expires, and that its withdrawal by mutual consent during its currency merely creates a new tenancy, taking effect on the expiration of the old one. But the Court of Appeal in Ireland has refused to treat the case as an authority for so broad a proposition, and, pointing out that it was not an action between a landlord and tenant, but between a landlord and a surety for the tenant, have held that a notice to quit which, during its currency, is abandoned by the consent

Effect of
withdrawal of
notice during
its currency.

of both parties, does not *per se* put an end to the old tenancy and create a new one. (*Boyd v. Phelan* (1884), 14 L. R., Ir. 239; *Lord Inchiquin v. Lyons* (1887), 20 L. R., Ir. 474.) But to leave the old tenancy in existence, the notice must be abandoned with the consent of all the parties to the old contract of tenancy. (*Ib.*) Therefore a surety for rent is discharged by a proper notice to quit, although the notice is afterwards withdrawn, but without his concurrence. (*Tayleur v. Wildin*, L. R., 3 Ex. 303; 37 L. J., Ex. 173; *Holme v. Brunskill*, 47 L. J., C. P. 610; 3 Q. B. D. 495.)

A valid notice determines underleases.

Notice to quit unnecessary in case of disclaimer.

A valid notice to quit determines not only the lease or tenancy, but all underleases the tenant may have created.

In the case of a disclaimer by a tenant of the title of his landlord, the tenancy is determined without any notice to quit. (*Doe v. Frowd*, 4 Bing. 557; *Doe v. Rollings*, 4 C. B. 188.)

CHAPTER IX.

RIGHTS AND LIABILITIES OF THE PARTIES ON THE
DETERMINATION OF THE TENANCY.SECT. 1.—*Fixtures*.

THE term “fixtures” is often used to express different meanings. (Broom’s Max. 372.) The sense in which it is most generally used is that of chattels affixed to or planted in the soil, so as to become part of the freehold. (*Climie v. Wood*, 37 L. J., Ex. 158, *per Kelly*, C. B.) The old rule of law is, that every chattel annexed to realty becomes upon annexation part of the realty, according to the maxim *quicquid plantatur solo, solo cedit*; and, though this old rule applies in its integrity as between a mortgagor and mortgagee of the freehold in respect of chattels attached by the former (*Holland v. Hodgson*, 41 L. J., C. P. 146; L. R., 7 C. P. 328; *Hautrey v. Butlin*, 42 L. J., Q. B. 163; L. R., 8 Q. B. 290; *Cross v. Barnes*, 46 L. J., Q. B. 479; *Smith v. Maclure*, 32 W. R. 459), yet, as between other persons, the rule has been very much relaxed (*per Kelly*, C. B., *Climie v. Wood*, *supra*), and there now exists a mass of authorities prescribing that chattels may (especially as between landlord and tenant) be annexed to the freehold, and yet remain as much chattels after they become annexed as they were before. (*Per Willes*, J., *Climie v. Wood*, 38 L. J., Ex. 223.) It therefore becomes important to consider by what means articles placed upon the demised premises by a tenant during the tenancy lose their character of chattels, and become fixtures. In connection with this point it should be noticed, that articles which are not fixtures are removable at all times before and after the determination of the tenancy, and, on the other hand, they are distrainable for rent.

Articles not
attached.

Articles not further attached than by their own weight, are generally to be considered as mere chattels, *e.g.*, wooden barns or other structures resting on, but not attached to, a brick or stone foundation (*Wansborough v. Maton*, 4 A. & E. 884; *Wiltshier v. Cottrell*, 1 E. & B. 674; *Rex v. Otley*, 1 B. & Ad. 161), or resting on the ground alone, though by their weight they may have become embedded in the ground (*Huntley v. Russell*, 13 Q. B. 572); and weighing machines resting in holes lined with brickwork, but not attached to the brickwork, so as to be lifted out at pleasure. (*Re Richards, Ex parte Astbury*, L. R., 4 Ch. 630.) But even in such a case, if the intention is apparent to make the articles part of the land, they become realty. (*D'Eyncourt v. Gregory*, L. R., 3 Eq. 382.) Thus, blocks of stone placed on the top of one another, without any mortar or cement, for the purpose of forming a drystone wall, would become part of the land, though the same stones if deposited in a builder's yard, and for convenience stacked in the form of a wall, would remain chattels. (*Per Blackburn, J., Holland v. Hodgson*, L. R., 7 C. P. 328.)

Articles
fastened only
for use as
chattels.

When an article is actually fastened to the building or land, the rule to determine whether it is a chattel or a fixture, is to consider in the first place whether it can be easily removed *intégrè, salvè et commodè* without injury to itself or to the fabric, and, in the next place, whether the annexation was for the permanent and substantial improvement of the freehold, or merely for a temporary purpose, *or for the more complete use and enjoyment of it as a chattel*. (*Per Parke, B., Hellawell v. Eastwood*, 20 L. J., Ex. 154; *Turner v. Cameron*, 39 L. J., Q. B. 125.) In accordance with this rule it has been held that machinery fastened for the purpose of steadying it, by screws let into the floor with molten lead (*Hellawell v. Eastwood, supra; Waterfall v. Penistone*, 6 E. & B. 876); distillery tanks, which formed the roofs of rooms and houses, boiling backs and mash tuns (lying on brick piers against the walls), which formed the floors of some of the rooms, and were screwed down for the purpose of being steadied, and connected to pipes which were attached to fixtures (*Chidley v. Churchwardens of West Ham*, 32 L. T., N. S. 486); pumps fastened with screws (*ib.*; and see *Grymes v. Boweren*, 6 Bing. 437); a hydraulic press fixed by means of brickwork to the floor of a factory (*Parsons v. Hind*, 14 W. R. 860); hangings, chimney-

glasses, pier-glasses or pictures slightly attached to the walls, for the purpose of holding them up in their places (*Beck v. Rebour*, 1 P. Wms. 94); chandeliers and seats merely screwed to the premises to steady them (*Dumergue v. Ramsey*, 10 W. R. 844); and carpets attached by nails to floors for the purpose of keeping them stretched (*per Parke, B., Hellawell v. Eastwood, supra*), are not fixtures. On the other hand, railways formed in the ordinary manner, by nailing the rails to wooden sleepers laid on the land, under and about which ballast was packed, were held to be fixtures, and not distrainable. (*Turner v. Cameron*, 39 L. J., Q. B. 125; but see *Beaufort v. Bates*, 31 L. J., Ch. 481.)

Of chattels which have become fixtures, some become so completely a part of the fabric, as essential to its use, that a tenant who has annexed them cannot remove them; as, for instance, doors and windows. There are others, however, annexed to the land for the purpose of use in trade or business, or for domestic convenience or ornament, in so permanent a manner as to become part of the land; but which, in order to encourage trade, or to enable a tenant to have full enjoyment of the land for the purpose of domestic convenience, a tenant who has erected them is entitled to remove during his term. (*Per Willes, J., Climie v. Wood*, L. R., 4 Ex. 328; 38 L. J., Ex. 223.)

As between landlord and tenant, fixtures annexed by the tenant are commonly distinguished as "tenant's" fixtures, and "landlord's" fixtures. By tenant's fixtures are meant those articles annexed by the tenant during his tenancy for the purpose of his trade, or his agriculture, or for mere ornament or domestic convenience, and which by way of exception to the general rule against irremovability a tenant is allowed to disannex and remove during his tenancy without the consent of the owner of the freehold. By landlord's fixtures are meant articles annexed by the tenant during the tenancy, but not coming within any of the before mentioned exceptions, as well as all articles, whether of the excepted classes or not, annexed at the commencement of the tenancy, notwithstanding they may have been annexed by the tenant, and not removed during a previous tenancy.

Accessories or adjuncts to fixtures are governed, as to the right of removal, by the same rules as the principal things

Articles affixed so as to become part of the fabric.

"Tenant's fixtures" and "landlord's fixtures."

to which they are accessory. (*Whitehead v. Bennett*, 27 L. J., Ch. 474; 6 W. R. 351.)

Trade
fixtures.

The test as to the removability of trade fixtures is whether the removal is in accordance with any prevailing practice, is possible without injury to the estate, and whether the articles were in themselves of a perfect chattel nature before they were put up, or at least have in substance that character independently of their union with the soil, or, in other words, whether they may be removed without being entirely demolished, or losing their essential character or value. (*Amos*, Fixtures, 48.) If they answer this description, it is immaterial that for the purposes of removal they have to be taken to pieces. (*Whitehead v. Bennett*, 27 L. J., Ch. 474.) Articles which as trade fixtures have been considered removable include a soap boiler's vats (*Poole's case*, 1 Salk. 368); salt pans fixed with mortar to a brick floor (*Lawton v. Salmon*, 1 H. Bl. 259, n.; *Mansfield v. Blackburne*, 6 Bing. N. C. 438); baker's ovens, furnaces, coppers in brewhouses, brewing vessels, and pipes (*Poole's case*, *supra*); an engine screwed down to planks, and a boiler fixed in brickwork (*Climie v. Wood*, *supra*); fire engines, steam engines and other machinery in the working of a colliery (*Lawton v. Lawton*, 3 Atk. 13; *Dudley v. Ward*, Amb. 113); a dutch barn set up for trading purposes, having a foundation of brickwork and uprights fixed in and rising from the brickwork, and supporting a roof composed of tiles, and the sides open (*Dean v. Allalley*, 3 Esp. 11); and a varnish house, built on plates laid on brickwork, let into the ground, with a brick chimney. (*Penton v. Robart*, 2 East, 88; and see *Fitzherbert v. Shaw*, 1 H. Bl. 258.) Buildings which are the mere accessories of removable machinery may usually be removed, but not if they are of a permanent character. (*Whitehead v. Bennett*, 27 L. J., Ch. 474.) Greenhouses and hothouses, erected by a market gardener or nurseryman for the purposes of his trade, are removable (*Penton v. Robart*, *supra*); but a conservatory, not for trading purposes, erected on a brick foundation, attached to a dwelling-house and communicating with it by windows opening into the conservatory, was held not to be removable (*Buckland v. Butterfield*, 2 B. & B. 54); and so were a greenhouse in a garden, and a boiler built into the brickwork in the greenhouse; but the pipes of the heating apparatus attached to the boiler

were held removable. (*Jenkins v. Gething*, 2 J. & H. 520; and see *Martin v. Roe*, 26 L. J., Q. B. 129.) So a nurseryman may at the end of his term remove trees planted for the purposes of his trade (*Lee v. Risdon*, 7 Taunt. 191); but a private person may not (*Wyndham v. Way*, 4 Taunt. 316), nor even a border of box, or a flower. (*Empson v. Soden*, 4 B. & Ad. 655.) But a nurseryman has no right to cut down trees which have taken root (*Oakley v. Monck*, 35 L. J., Ex. 87; L. R., 1 Ex. 159); or to remove vines and trees which are fruit bearing, and are used by him as a market gardener, and not as a nurseryman. (*Wardall v. Usher*, 10 L. J., C. P. 316; 3 Scott, N. R. 508.)

The exception in favour of trade does not extend to agriculture; and a tenant in agriculture who erected a beast house and other farm buildings which were let into the ground, was held not entitled to remove them, though he left the premises in the same state as when he entered. (*Elwes v. Mawc*, 3 East, 38; 2 Smith's L. C. 182, 9th ed.) However, by the 14 & 15 Vict. c. 25, s. 3, it is provided that "if any tenant of a farm or lands shall after the passing of this Act (24th July, 1851), *with the consent in writing of the landlord* for the time being, erect any farm building, either detached or otherwise, or put up any other building, engine or machinery, either for agricultural purposes or for the purposes of trade and agriculture (which shall not have been erected or put up in pursuance of some obligation in that behalf), then all such buildings, engines and machinery shall be the property of the tenant, and shall be removable by him notwithstanding the same may consist of separate buildings, or that the same or any part thereof may be built in or permanently fixed to the soil, so as the tenant making any such removal do not in anywise injure the land or buildings belonging to the landlord, or otherwise do put the same in like plight and condition, or as good plight and condition as the same were in before the erection of anything removed." But the tenant may not remove any such matter or thing without first giving one month's notice in writing to the landlord or his agent, when it shall be lawful for the latter to elect to purchase; the value to be ascertained by two referees or their umpire. (As to the right to remove an unfinished erection, mainly constructed with timbers supplied by the landlord, see *Smith v. Render*, 27 L. J., Ex. 83; 5 W. R. 875.)

Agricultural
fixtures.

14 & 15 Vict.
c. 25, s. 3.

38 & 39 Vict.
c. 92, s. 53.

This salutary enactment was to a certain extent superseded by s. 53 of the Agricultural Holdings Act, 1875 (38 & 39 Vict. c. 92), so far as concerns tenancies to which the latter Act is applicable. The provision is as follows:—
“Where after the commencement of this Act (14th February, 1876) a tenant affixes to his holding any engine, machinery, or other fixture for which he is not under this Act or otherwise entitled to compensation, and which is not so affixed in pursuance of some obligation in that behalf, or instead of some fixture belonging to the landlord, then such fixture shall be the property of and be removable by the tenant.” But before removal, the tenant must pay all rent and satisfy all other obligations in respect of the holding; he shall not in removal do any avoidable damage, and shall after removal make good all damage occasioned by the removal; he shall not remove any fixture without a month’s previous notice in writing to the landlord, who may elect to purchase; the value in case of difference to be settled by reference. The section does not apply to a steam-engine erected by the tenant, if before erection he has not given the landlord notice of his intention to do so, or if the landlord has in writing objected to the erection.

46 & 47 Vict.
c. 61, s. 34.

This provision is repealed as from the 1st of January, 1884, by the Agricultural Holdings Act, 1883,—but without affecting any right in respect of fixtures affixed to a holding before that date (46 & 47 Vict. c. 61, s. 62), so that the right of removal in respect of fixtures affixed between the 14th of February, 1876, and the 1st of January, 1884, to a holding to which the Act of 1875 applied, will still be regulated by the repealed provision—and in lieu of the repealed provision is substituted sect. 34 of 46 & 47 Vict. c. 61, as follows:—“Where after the commencement of this Act (1st January, 1884), a tenant affixes to his holding any engine, machinery, *fencing or other fixture*, or erects any building for which he is not under this Act or otherwise entitled to compensation, and which is not so affixed or erected in pursuance of some obligation in that behalf, or instead of some fixture or building belonging to the landlord, then such fixture or building shall be the property of and be removable by the tenant before or within a reasonable time after the termination of the tenancy.” The provisoes in the 53rd section of the Act of 1875 are repeated, namely, that before removal the tenant must pay all rent and satisfy all other obligations

in respect to the holding; that he shall not in removal do any avoidable damage, and shall make good all damage occasioned to any other building or other part of the holding, and shall not remove any fixture without a month's previous notice in writing to the landlord, who may elect to purchase on paying the fair value thereof to an incoming tenant, such value, in case of difference, to be settled by reference. The stipulation that the section shall not apply to a steam-engine erected without notice is, however, omitted.

It should be pointed out that the right of removal here given is not limited to agricultural fixtures, but would seem to include even fixtures put up for ornament or domestic convenience.

The tenant is given "*a reasonable time after the termination of the tenancy*" to remove. It is not clear what is intended by these words, but it is submitted that the removal must take place while the tenant is still in possession of the premises. (*Weeton v. Woodcock*, 7 M. & W. 14; *Ex parte Stephen, Re Lavies*, 7 Ch. D. 127; 47 L. J., Bkcy. 22.)

The privilege of removal in respect of fixtures put up for ornament or domestic convenience is more limited than that in favour of trade. The test of removability seems to be whether they are slightly fixed, *can be removed entire*, and with little or no damage to the fabric. (*Grymes v. Boweren*, 6 Bing. 437; *Avery v. Cheslyn*, 3 A. & E. 75.) The following have been held, or by the Courts regarded, as removable:—Bells (*Lyde v. Russell*, 1 B. & Ad. 394), cornices (*Avery v. Cheslyn*, *supra*), wainscots fixed only by screws (*Lawton v. Lawton*, 3 Atk. 15), bookcases and other furniture fixed by holdfasts, screws, or nails to the wall (*Birch v. Dawson*, 2 A. & E. 37; *Ex parte Quincy*, 1 Atk. 477), ornamental chimney-pieces (*Leach v. Thomas*, 7 C. & P. 327; *Bishop v. Elliott*, 11 Ex. 113; 24 L. J., Ex. 229), iron backs to chimneys (*Harvey v. Harvey*, 2 Str. 1141), stoves and grates fixed with brickwork in the chimney-places, but removable without injury to the chimney-place (*Rex v. St. Dunstan*, 4 B. & C. 686), pumps slightly attached (*Grymes v. Boweren*, *supra*), cooling coppers, mash tubs, water tubs, and blinds. (*Per Abbott*, C. J., *Colegrace v. Dias Santos*, 2 B. & C. 77.) But ordinary fixtures put up to complete the house, as hearths and chimney-pieces, not ornamental (*Poole's case*, 1 Salk. 368; *Bishop v.*

Fixtures for ornament or domestic convenience.

Elliott, supra), fire grates (*Richardson v. Ardley*, 38 L. J., Ch. 508), a ladder fixed to the ground and to a beam above, being the only means of access to the room above, a crank nailed at top and bottom to keep it in its place, and a bench nailed to the wall (*Wilde v. Waters*, 16 C. B. 637; 24 L. J., C. P. 193), are not removable. Neither are conservatories. (*Ante*, p. 394.)

Right of removal regulated by custom or contract.

Custom will often extend or regulate the right of removal in the case of fixtures. (*Davis v. Jones*, 2 B. & Ald. 165; *Wake v. Hall*, 8 App. Cas. 195; 52 L. J., Q. B. 494; *Ward v. Countess of Dudley*, 57 L. T. 20.) Frequently, also, the right is controlled by the contract of the parties. Thus:—(1.) the tenant may renounce in terms his right to remove fixtures. (*Dumergue v. Rumsey*, 2 H. & C. 777; 33 L. J., Ex. 88.) This may be either absolutely or in certain specified events, as where it was agreed that in case the tenant became bankrupt or insolvent, or if a distress or execution should be levied on the premises, the landlord might re-enter and “seize and retain for his own use all fixtures whatsoever, whether tenant’s or trade fixtures or otherwise.” (*Ib.*; *R. v. Topping*, M’Cl. & Y. 544.)

(2.) Sometimes the lease contains a covenant by the tenant to leave and deliver up all fixtures, with or without a stipulation for payment of their value. (*Clark v. Crownshaw*, 3 B. & Ad. 805.) Sometimes the covenant enumerates articles to be left, and then the only question is whether the disputed article falls within the specific enumeration. (*Burt v. Haslett*, 25 L. J., C. P. 201, 295.)

(3.) A tenant may contract himself out of his ordinary right to remove fixtures by the usual repairing covenants. Thus, a covenant to *yield up* in repair the premises with all “erections” or “improvements,” has been held to prevent the removal of any fixtures, even though erected for the purpose of trade. (*Bidder v. Trinidad Petroleum Co.*, 17 W. R. 153; *Martyr v. Bradley*, 9 Bing. 24; *Naylor v. Collinge*, 1 Taunt. 19; *West v. Blakeway*, 2 M. & G. 729; 10 L. J., C. P. 173; *Burt v. Haslett*, 25 L. J., C. P. 201, 295; *Penry v. Brown*, 2 Stark. 403.) But some of the modern authorities have treated the covenant to yield up in repair, although couched in the widest terms, as restricted to those fixtures which as part of the fabric the tenant is at common law obliged to yield up. Thus, a covenant to surrender at the end of the term the premises, together with all locks, keys, bars, bolts, marble and other

chimney-pieces, footpans, slabs, "and other fixtures, and articles in the nature of fixtures, which shall at any time during the said term be fixed or fastened to the said demised premises, or be thereto belonging," was held not to prevent the tenant removing trade and tenant's fixtures, but only landlord's fixtures, the Court considering the enumerated articles to be all landlord's fixtures, and the general words following as restricted to fixtures *ejusdem generis*. (*Bishop v. Elliott*, 11 Ex. 113; 24 L. J., Ex. 229; *Sumner v. Bromilow*, 34 L. J., Q. B. 130; *Dumergue v. Rumsey*, *supra*.) In other cases it has been held that the meaning of the covenant is to be ascertained by giving the language used its ordinary import, regardless of common-law rights or the doctrine of *ejusdem generis* (*Bidder v. Trinidad Petroleum Co.*, *supra*; *Burt v. Haslett*, *supra*; *Wilson v. Whateley*, 30 L. J., Ch. 673; 1 J. & H. 436); and this would clearly be so where the general words follow a specific enumeration which includes both landlord's and tenant's fixtures.

A covenant to yield up in repair all erections and improvements except certain specified articles, entitles the tenant to remove the articles specified, and notwithstanding the masonry of the premises be thereby necessarily damaged, he is not bound to restore it. (*Foley v. Addenbrooke*, 13 M. & W. 174.)

If a fixture belonging to the landlord be worn out, and the tenant, though not bound to do so, substitutes a new one, the substituted one will be subject to the stipulations contained in the lease as to the old one. (*Sunderland v. Newton*, 3 Sim. 450; *Martyr v. Bradley*, 9 Bing. 24.)

Where a tenant has the right to remove fixtures, he must exercise that right either during his original term (*Lyde v. Russell*, 1 B. & Ad. 394), or during such further period of possession by him as he holds the premises under a right still to consider himself as tenant. (*Weeton v. Woodcock*, 7 M. & W. 14; *Ex parte Stephens, Re Lavies*, 7 Ch. D. 127; 47 L. J., Bkcy. 22.) So soon after the end of his term as the tenant is treated as a trespasser by the landlord, the right of removal is gone. (*Heap v. Barton*, 21 L. J., C. P. 153.) But it does not seem settled whether or not a tenant who remains in possession as a mere tenant at sufferance has this right. (*Leader v. Homewood*, 5 C. B., N. S. 546; 27 L. J., C. P. 316.) In whatever way a lease may be determined, whether by forfeiture or by

Time of
removal.

effluxion of time, the tenant has no right to remove fixtures after the landlord has recovered in an ejectment or re-entered without legal proceedings, or after the tenant's possession has ceased to be lawful (*Pugh v. Arton*, L. R., 8 Eq. 626; 38 L. J., Ch. 619; *Minshall v. Lloyd*, 2 M. & W. 450), unless in accordance with a provision in the lease (*Stansfield v. Mayor of Portsmouth*, 27 L. J., C. P. 124; *Ex parte Gould, Re Walker*, 13 Q. B. D. 454; 51 L. T. 368), or by virtue of a licence, which must be under seal. (*Roffey v. Henderson*, 21 L. J., Q. B. 49; 17 Q. B. 574.)

After surrender.

If a tenant mortgage the tenant's fixtures and afterwards surrender the lease, the mortgagee has still the right during a reasonable period after the surrender to enter and sever them (*London and Westminster Loan and Discount Co. v. Drake*, 6 C. B., N. S. 798; 28 L. J., C. P. 297; *Moss v. James*, 47 L. J., Q. B. 160; on appeal, 38 L. T., N. S. 595); and so, where a trustee in liquidation sold the fixtures, and afterwards, without a formal disclaimer, surrendered the lease, the purchaser was held to be entitled to a reasonable time for their removal. (*Saint v. Pilley*, 44 L. J., Ex. 33; L. R., 10 Ex. 137.)

After disclaimer in bankruptcy.

The Bankruptcy Act, 1869, s. 23, enabled a trustee to disclaim leaseholds, and in the event of a disclaimer, the term was deemed to be surrendered as from the date of adjudication in case of bankruptcy, and as from the appointment of the trustee in the case of liquidation, and in either case the trustee took no interest in the term and had no right to sever and remove the fixtures (*Ex parte Stephens, Re Lavies*, 7 Ch. D. 127; 47 L. J., Bkcy. 22; *Ex parte Brook, Re Roberts*, 10 Ch. D. 100; 48 L. J., Bkcy. 22; *Ex parte Glegg, Re Latham*, 19 Ch. D. 7; 51 L. J., 367; *Ex parte Allen, Re Fussell*, 20 Ch. D. 341; 51 L. J., Ch. 724; 30 W. R. 601); and the Court had no power to make any order altering the rights of the parties in relation to the fixtures. Under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), sect. 55, sub-sect. 3, the Court, upon granting leave to disclaim, may make "such orders with respect to fixtures, tenant's improvements, and other matters arising out of the tenancy as the Court thinks just." (*Ex parte Painter, Re Moser*, 33 W. R. 16; 13 Q. B. D. 738.) If no special order is made the trustee will have no right to remove the fixtures.

If the fixtures have been disannexed during the term,

so as to become chattels, they may be removed after the term has expired. (*Darby v. Harris*, 1 Q. B. 895.)

Tenant's fixtures left by a former tenant do not become the tenant's fixtures of the subsequent tenant. (*Ex parte Willoughby D'Eresby, Re Thomas*, 44 L. T. 781; 29 W. R. 527.) And if after the tenancy has determined the tenant continues in possession under a new agreement or lease, and nothing is said as to the fixtures, the right of removal is lost, and he is in the same position as if the landlord, being seised of both land and fixtures, had demised both to him. (*Fitzherbert v. Shaw*, 1 H. Bl. 258; *Thorpe v. Milligan*, 5 W. R. 336; *Thresher v. East London Waterworks Co.*, 2 B. & C. 608.)

Fixtures not removed during term in which erected.

Where the right of removal exists, it prevails against the mortgagee of the landlord as well as against himself. (*Sanders v. Davis*, 15 Q. B. D. 518; 54 L. J., Q. B. 576.)

Right as against landlord's mortgagee.

If a tenant agree to sell and give up possession of fixtures to the landlord, he can recover their value though the agreement be not in writing. (*Hallen v. Runder*, 1 Cr. M. & R. 266; *Lee v. Gaskell*, 1 Q. B. D. 700; 45 L. J., Q. B. 540.)

Agreement to sell fixtures not required to be in writing.

For the improper removal of fixtures, whether amounting to a breach of covenant or not, the landlord may maintain an action for waste (*Hitchman v. Walton*, 4 M. & W. 409; *Kinlyside v. Thornton*, 2 W. Bl. 1111), or he may sue for breach of the special covenant. (*Ib.*) Against a threatened removal, he may apply for an injunction (*Sunderland v. Newton*, 3 Sim. 450; *Richardson v. Ardley*, 38 L. J., Ch. 508); and after actual removal he may maintain an action in the nature of the old action for trover. (*Farrant v. Thompson*, 5 B. & Ald. 826; *Hitchman v. Walton*; *Petre v. Ferrers*, 61 L. J., Ch. 426; 65 L. T. 568.)

Remedies for removal of fixtures.

In an action for waste the damages will be the amount of the injury to the reversion. For breach of covenant in removing fixtures their actual value as such, and not merely their value as chattels, may be recovered (*Thompson v. Pettitt*, 10 Q. B. 103; 16 L. J., Q. B. 162; *Moore v. Drinkwater*, 1 F. & F. 134); for in the case of a freehold reversion that is the actual damage sustained. But the landlord cannot recover more than the real amount of the damage he has sustained, and a landlord with a reversion of three days was held only entitled to the amount of damage he sustained by being deprived of the possession of the fixtures for three days. (*Watson v. Lane*,

Damages.

11 Ex. 769; 25 L. J., Ex. 101.) In an action of trover, the damages recoverable will be the value of the fixtures as chattels. (*Clarke v. Holford*, 2 C. & K. 540.)

Where a tenant, or a person claiming under him, has the right to sever and remove fixtures, he may maintain an action against the person who has prevented him exercising that right, and recover the value of the fixtures as severed. (*London and Westminster Loan Co. v. Drake*, 6 C. B., N. S. 798; 28 L. J., C. P. 297.) Until severed an action of trover did not lie in respect of fixtures as savouring of realty. (*Minshall v. Lloyd*, 2 M. & W. 450.)

SECT. 2.—*Emblements*.

Emblements
on determi-
nation of
uncertain
tenancies.

By the general rule of common law, if a tenant of land has an uncertain or contingent interest, so that at the time he sows his crop he cannot be sure whether his tenancy will determine before, or last beyond, the time of harvest, and it is determined before the harvest by the act of God, by operation of law, or by the act of another person, the tenant or his representative is entitled to emblements, *i. e.*, the profits of the sown land. (Shep. Touch. 244; *Bulwer v. Bulwer*, 2 B. & Ald. 470.)

The right attaches to the estate of a tenant at will, a tenant for life, the lessee for years of a tenant for life, and to all other estates determinable by the act of the landlord, or by death, or by operation of law.

Unless by the
tenant's act.

If an uncertain estate be determined by the tenant's own act, as if the tenant surrender, or in the case of a woman being tenant during widowhood, she think proper to marry, or if the estate of the tenant is determined by entry for forfeiture on condition broken, or the like, in each of these cases the tenant is not entitled to emblements. (Co. Litt. 55 b; *Bulwer v. Bulwer*, 2 B. & Ald. 470; *Davies v. Eyton*, 7 Bing. 154.) But where the lessee who has so determined his estate has let in an underlessee, the latter will be entitled.

What crops
may be
claimed.

Emblements extend to every species of crop which is not produced spontaneously, but by industry and manurance, and which ordinarily repays the labour by which it is produced within the year in which the labour is bestowed, though the crop may in extraordinary seasons be delayed beyond

that period. (*Graves v. Weld*, 5 B. & Ad. 105.) They include therefore corn, turnips, carrots, potatoes, hemp, flax, saffron and the like, and hops also, for though they spring from old roots, yet they are annually manured. (Co. Litt. 55 b (n. 1.) On the other hand, no things requiring more than a year to come to maturity are capable of being emblements (*Graves v. Weld, supra*); and growing crops of grass, even if grown from seed, and though ready to be cut for hay, cannot be taken as emblements; for this is a natural product, though it may be improved by cultivation. (Co. Litt. 56 a.) It would seem that crops of artificial grasses, such as clover, might.

The right to emblements includes the right for the tenant, or any person to whom he may assign them, to enter, cut and carry them away. (Co. Litt. 56 a.)

Right to enter to take.

With respect to tenancies at rack rent, which determine by the death or cesser of the estate of the landlord, the common law right to emblements is superseded by 14 & 15 Vict. c. 25, s. 1, which provides, that "where the lease or tenancy of any farm or lands, held by a tenant at rack rent, shall determine by the death or cesser of the estate of any landlord entitled for his life, or for any other uncertain interest, instead of claims to emblements, the tenant shall continue to hold and occupy such farm or lands until the expiration of the then current year of his tenancy, and shall then quit upon the terms of his lease or holding, in the same manner as if such lease or tenancy were then determined by effluxion of time or other lawful means during the continuance of his landlord's estate; and the succeeding landlord or owner shall be entitled to recover and receive of the tenant, in the same manner as his predecessor or such tenant's lessor could have done, if he had been living or had continued the landlord or lessor, a fair proportion of the rent for the period which may have elapsed from the day of the death or cesser of the estate of such predecessor or lessor to the time of the tenant so quitting, and the succeeding landlord or owner and the tenant respectively shall, as between themselves and as against each other, be entitled to all the benefits and advantages and be subject to the terms, conditions and restrictions to which the preceding landlord or lessor and such tenant respectively would have been entitled and subject in case the lease and tenancy had determined in manner aforesaid at the expiration of such current year:

Right to, how affected by 14 & 15 Vict. c. 25.

provided always, that no notice to quit shall be necessary or required, by or from either party, to determine any such holding and occupation as aforesaid."

The statute applies wherever, at the determination of the tenancy, there are on the land crops or roots in respect of which the tenant might have claimed a right to emblements, as in the case of a cottage with an acre of ground, partly cultivated as a garden, and partly sown with corn and planted with potatoes. (*Haines v. Welch*, L. R., 4 C. P. 91; 38 L. J., C. P. 118.)

SECT. 3.—*Away-going Crops and other Tenant Rights.*

Unsevered
crops property
of landlord.

Emblements can be taken only when the end of a tenancy depends upon an uncertainty. When the tenant of a farm knows at what time his interest will cease, all crops not severed when the tenancy expires, must be given up to and become by the common law the property of the landlord, as part of the land itself. (Co. Litt. 55 a; *Caldecott v. Smythies*, 7 C. & P. 808.)

Subject to
custom or
contract.

This hardship of the common law is in most instances controlled, either by express agreement, or by the custom of the country, allowing the outgoing tenant his share of away-going crops, *i.e.*, crops sown in the last year of the tenancy, but not harvested until after it has expired. Custom or contract also attaches other important incidents to the end of the tenancy, such as the tenant's right to compensation for tillage and other acts of husbandry and improvements. These privileges of an off-going agricultural tenant are commonly referred to as "tenant right."

"Tenant
right" in
respect of
other matters.

On the other hand, while at common law all the straw, hay, manure, and severed corn and other chattels belong to and are removable by the outgoing tenant, custom often provides for their being consumed or left upon the land, an allowance being made for them to the tenant. Again, by custom or contract the tenant is often allowed to retain a portion of the demised premises after the expiration of the tenancy, to thrash his crops, or to enable his sheep or cattle to consume the last year's crops; and on the other hand, custom or contract often permits the landlord or his incoming tenant to enter upon a portion of the arable land before the expiration of the tenancy, for the purpose of

ploughing or cultivating it. (*Milner v. Myers*, 15 L. J., Q. B. 157; *Milner v. Jordan*, 8 Q. B. 615.)

Where the tenant holds on the general terms of cultivating according to good husbandry, drainage may be part of it, and a custom for the outgoing tenant to charge his landlord with part of the expenses of such drainage, though done without his consent or knowledge, is reasonable. (*Mousley v. Ludlam*, 21 L. J., Q. B. 64.)

The rules of law as to customs being the same in respect of all matters to which they apply, we shall treat of the rights and obligations under customs generally, allowing the practitioner to apply those general rules to the specific matter, whether crops, tillages, straw, or whatever it may be, affected by custom. This becomes the more necessary since customs vary so widely, both in their nature and extent, in different parts of the country.

Rights under custom.

A custom of the country need not, as we have before observed (Chap. V., Sect. 6), be immemorial; it is sufficient if it be shown to be the prevalent usage of the district in which the land is situated.

Custom means usage.

The readiest solution of the inquiry as to what allowances an outgoing tenant is entitled to, is to ascertain upon what terms he entered; for the custom of the country is founded upon this principle, that justice requires that a tenant should quit upon the same terms as he entered; and if, when he entered upon the farm he paid for away-going crops, or for foldage, manure, fallowing or tillage, then he is entitled to be paid for such matters upon quitting. (*Webb v. Plummer*, 2 B. & Ald. 751, per Bayley, J.)

The principle being that as a tenant enters so he leaves.

Custom attaches its incidents to all tenancies whether by parol or by deed (*Wigglesworth v. Dallison*, 1 Smith, L. C. 569, 9th ed.; *Tucker v. Linger*, 8 App. Cas. 508; 52 L. J., Ch. 941), and to tenancies from year to year, as well as for a term (*Onslow v. —*, 16 Ves. 173), even in respect of tillages. (*Brocklington v. Saunders*, 13 W. R. 46.)

Custom and lease construed together,

If there are express words excluding the custom, or if the lease contains stipulations which are repugnant to or inconsistent with it, to that extent the custom is superseded.

unless inconsistent.

Where a tenant from year to year, entitled to certain away-going rights by the custom, accepted a lease containing special provisions as to those rights, his rights under the yearly tenancy were held to be extinguished. (*England v. Shearburn*, 52 L. T. 22.) But where a lease provided that on its termination the tenant should receive compen-

sation for unexhausted improvements, he was held not to have lost his right by acceptance of a lease for a further term which was silent as to compensation. (*Lane v. Moeder*, Cab. & E. 548.)

It is sometimes difficult to say, whether or not the terms of a lease do exclude a particular custom as to the tenant's away-going rights. When the lease expressly makes a different provision in respect of away-going rights, the custom is excluded. (*Boraston v. Green*, 16 East, 71.) But if the lease contain no stipulations as to *quitting*, the tenant is entitled to away-going crops according to the custom, though the terms of the *holding* may be inconsistent with the custom (*Holding v. Piggott*, 7 Bing. 465); and where the lease provided that the tenant should "during the term consume with stock on the farm all the hay, straw and clover grown thereon, which manure shall be used on the said farm," but made no provision as to the unconsumed straw at quitting, it was held that the matter was governed by custom, in accordance with which it was to be left on the farm on being paid for. (*Muncey v. Dennis*, 26 L. J., Ex. 66; 1 H. & N. 216.) And again, where a landlord, who held under leases which excluded the custom for the outgoing tenant to be paid for tillages, let to an under-tenant "subject to the same rents, covenants, and obligations in all respects" as were contained in the head leases, this was held not to exclude the custom, and the tenant, having paid for the tillages on entering, was entitled to be paid for them on leaving. (*Fariell v. Gaskoin*, 7 Ex. 273; 21 L. J., Ex. 85.)

Even if the lease contain a stipulation as to some rights of the parties on the determination of the tenancy, that will not exclude the custom as to other rights to which no reference is made: thus, where a lease provided that the tenant should consume three-fourths of the hay and straw on the farm, and spread the manure arising therefrom, and leave such of it as should not be spread on the land, for the use of the landlord, on receiving a reasonable price for it, but making no provision as to seeds and labour, it was held not to exclude the tenant's right to an allowance for seeds and labour under a custom of the country by which tenants at quitting were entitled to payment for seeds and labour. (*Hutton v. Warren*, 1 M. & W. 466.) But if it appear distinctly by the lease, that the stipulated payments are the only ones to be made, the custom will be excluded.

(*Webb v. Plummer*, 2 B. & Ald. 746.) Thus, if there was a covenant by the tenant to plough and sow a certain portion of the demised land in the last year, being such as the custom of the country required, he being paid on quitting for the *ploughing*, or to plough, sow and manure, he being paid for the *manuring*, the principle of *expressum facit cessare tacitum* would apply. (*Per Parke, B., Hutton v. Warren*, 1 M. & W. 478.) So, a stipulation in a lease, binding the tenant to leave manure, the manure to be expended on the land, without making any mention of payment for it, was held to exclude the custom for an outgoing tenant to leave and be paid for such manure. (*Roberts v. Barker*, 1 Cr. & M. 808.) And since the principle of custom is to secure to the tenant on going out the like payments as he made when he went in, an agreement that the tenant shall pay on *leaving* will exclude a claim by the landlord for payment under the custom for manures, &c., upon his coming in. (*Clarke v. Roystone*, 13 M. & W. 752.)

Where under an agreement an outgoing tenant is to be paid for certain matters, the payment must be in accordance with the custom. Thus, a stipulation that the outgoing tenant should be paid for straw, was held in accordance with the custom to mean straw at a fodder price, viz., one-half the market price. (*Clarke v. Westrope*, 25 L. J., C. P. 287.)

Rate of payment regulated by custom.

When the tenant is entitled to away-going rights and payments, whether by custom or contract, he is only so entitled when he quits according to the terms of the contract and the tenancy expires in its natural course, and not where it is determined by forfeiture (*Silcock v. Farmer*, 46 L. T. 404), or is abandoned by the tenant during the currency of the tenancy. (*England v. Shearburn*, 52 L. T. 22; *Whittaker v. Barker*, 1 Cr. & M. 113.) And a custom by which a tenant was entitled to away-going crops upon the regular expiration of a Lady-day tenancy, was held to be excluded where the tenancy was determined on the 1st of June by an award. (*Thorpe v. Eyre*, 1 A. & E. 926.)

Tenant not entitled if tenancy determines by forfeiture, &c.,

If the tenant become bankrupt, his trustee, whether he disclaim the lease or not, will not be allowed to sell off crops, manure, hay or straw, contrary to the provisions of the lease. (*Ex parte Whittington*, Buck, 87; *Ex parte Maundrell*, 2 Mad. 315.)

or bankruptcy.

The effect of a disclaimer under the Bankruptcy Act, 1869, was that neither the lessor nor the trustee could

claim the benefit of provisions to come into force at the expiration or sooner determination of the tenancy, so that the tenant lost his right to be paid for tillages, and the landlord lost his right to take the hay and straw at a feed price, or at any other than a market price. (*Ex parte Dyke, Re Morrish*, 22 Ch. D. 410; 52 L. J., Ch. 570.) But if the trustee did not disclaim, and occupied to the end of the term, he would be entitled to the tenant's away-going rights. (*Alloway v. Steere*, 10 Q. B. D. 22; 52 L. J., Q. B. 38.) Now under the Bankruptcy Act, 1883, sect. 55, sub-s. 3, the Court has power, upon giving the trustee leave to disclaim, to make such order as it thinks just in respect of the tenant's away-going rights.

Compensation under Agricultural Holdings Act, 1883, how far substituted for customary compensation.

Where by custom a tenant is entitled to compensation in respect of matters for which he is entitled to compensation under the Agricultural Holdings Act, 1883, the latter compensation is substituted for the former; but, except as to the specific improvements defined in the first schedule to the Act, his right to claim compensation by custom, agreement, or otherwise, is unaffected by the Act. (46 & 47 Vict. c. 61, ss. 57, 60.)

Right to away-going crops independent of obligations as to cultivation.

By the terms of the lease, the right to away-going crops may be made to depend upon the tenant adopting a specified course of husbandry (*Holding v. Pigott*, 7 Bing. 465); but unless this is so, the outgoing tenant's rights to crops, in accordance with the custom or his lease, will not depend upon whether or not he has complied with his obligations in respect of the cultivation of the land (*Boraston v. Green*, 16 East, 79, 80); for, in such a case, the landlord would have his remedy against the tenant for breach of covenant or agreement, and the tenant would take his crop under the custom. (*Holding v. Pigott*, 7 Bing. 476.) But where the custom is for a tenant in his last year of tenancy to crop land in a particular way, as, for instance, to crop one-third of the arable land with wheat, and to reap that wheat after the tenancy has expired, if the tenant crop more than one-third, the landlord will be entitled to the excess (*Caldecott v. Smythies*, 7 C. & P. 808), unless it were sown with the landlord's permission. (*Griffiths v. Tombs, ib.*, 810.)

If an outgoing tenant, not having a right to away-going crops, remove them, the landlord and not the incoming tenant will have an action for them. (*Daries v. Connop*, 1 Price, 53; *Boraston v. Green, supra.*)

An outgoing tenant's interest in the sown land may be either a possession or merely an easement. Thus, in the case of a custom by which the outgoing tenant was entitled to two-thirds of the crops on the land at the end of the tenancy, but he was to cut the whole and keep the fences in repair until it was cut and carried away, it was held that the effect of such a custom was to vest the possession of the field in the outgoing tenant until the crop was carried (*Griffiths v. Puleston*, 13 M. & W. 358; *Beaty v. Gibbons*, 16 East, 116); and by custom or agreement he may have the use of the barns to thrash out his crop. (*Beavan v. Delahay*, 1 H. Bl. 5; *Knight v. Benett*, 3 Bing. 364.) But where the custom or agreement is that the landlord shall have the crop at a valuation, all the outgoing tenant can claim is the right to go upon the land to improve the crop whilst growing. (*Strickland v. Maxwell*, 2 Cr. & M. 539; 3 L. J., Ex. 161.) If a tenant bound to consume hay, or bring on a rateable amount of manure for any sold, sell the hay, the incoming tenant may refuse to allow its removal until the manure is brought on. (*Smith v. Chance*, 2 B. & Ald. 753.)

Away-going rights when coupled with right to possession of land.

Whether the outgoing tenant's claim arises under the custom of the country or the express provisions of the lease, his remedy is primarily against the landlord and not against the incoming tenant (*Sucksmith v. Wilson*, 4 F. & F. 1083; *Fariell v. Gaskoin*, 7 Ex. 273; 21 L. J., Ex. 85); and an alleged custom making the incoming tenant liable in exoneration of the landlord is bad. (*Bradburn v. Foley*, 3 C. P. D. 129; 47 L. J., C. P. 331.) And the primary liability of the landlord is the same, even where he is the assignee of the reversion, to whom possession has been yielded up under a notice to quit given by the original landlord, although all the rent has been paid to the original landlord. (*Womersley v. Dally*, 26 L. J., Ex. 219.) Where at the expiration of the lease the landlord is only tenant for life, he is subject to the liability of paying the outgoing tenant's claim. (*Mansel v. Norton*, 22 Ch. D. 769; 52 L. J. Ch. 357.)

Landlord liable to outgoing tenant.

The outgoing tenant may recover upon a *quantum meruit*, and the ascertainment of the amount by valuation is not a condition precedent to the right to sue, unless expressly made so by the terms of the lease. (*Sucksmith v. Wilson*, *supra*.) And so where there is an agreement for a valuation, but it has become impracticable, and the defendant

No valuation—effect on right of action.

Remedy on valuation.

has had the benefit of the outgoings. (*Clarke v. Westrope*, 25 L. J., C. P. 287; 18 C. B. 765.) Where there has been a valuation made in the usual way, it would appear that it cannot be opened although the valuers may have included therein things which, by the custom of the country, should not have been valued or did not exist. (*Freeman v. Jeffries*, L. R., 4 Ex. 189; 38 L. J., Ex. 116.) Nor is the valuation an award in respect of which the person in whose favour it is made can issue execution under the Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 12. (*Re Hammond and Waterton*, 62 L. T. 808; *Re Dawdy*, 54 L. J., Q. B. 574; 15 Q. B. D. 456; *Re Carus-Wilson and Greene*, 18 Q. B. D. 7; 55 L. T. 864.) The only remedy is an action on the contract.

Service of writ out of jurisdiction.

A contract, whether express or implied, by the landlord to pay for tenant-right is one "affecting land" within R. S. C. Ord. XI., r. 1 (b), so that in an action by the tenant in respect thereof, service of the writ out of the jurisdiction may be allowed. (*Kaye v. Sutherland*, 20 Q. B. 147; 57 L. J., Q. B. 68.)

Express contract of incoming tenant to pay,

As the money eventually comes out of the pocket of the incoming tenant, it is usually agreed between the parties that the landlord shall be discharged, and the outgoing tenant look only to the incoming tenant for payment. (*Sucksmith v. Wilson*, 4 F. & F. 1083; *Fariell v. Gaskoin*, 21 L. J., Ex. 85; *Muncey v. Dennis*, 26 L. J., Ex. 66; 1 H. & N. 216.) Such an agreement, even so far as it relates to growing crops, is not one concerning an interest in land within the meaning of the 4th section of the Statute of Frauds, and does not therefore require to be in writing (*Mayfield v. Wadsley*, 3 B. & C. 366; *Lee v. Gaskell*, 1 Q. B. D. 700; 45 L. J., Q. B. 540; *Adams v. Hoole*, per Denman, J., Birmingham Assizes, on further consideration, 7 May, 1892), unless it is part only of an agreement which includes a contract to give possession of the land itself. (*Earl of Falmouth v. Thomas*, 1 Cr. & M. 89; *Harrey v. Grabham*, 5 A. & E. 61—these were sales by the landlord.)

does not require landlord's assent.

There is no rule of law which prevents the outgoing and incoming tenants entering into such an agreement without the landlord's assent, but if he does not assent he is not ousted of his rights. (*Stafford v. Gardner*, L. R., 7 C. P. 242; 20 W. R. 299; 25 L. T. 876, per Brett, J.) And where by the custom of the country the landlord was bound to compensate the outgoing tenant for tillages and

things left on the farm, having the right to deduct from the amount any rent due, and the outgoing contracted with the incoming tenant that the latter should take to those things, it was held that the latter stood in the place of the landlord, and could deduct from the sum agreed to be paid the amount of rent in arrear. (*Stafford v. Gardner, supra.*) As the decision was based chiefly upon the ground of the landlord's right of distress being available against the incoming tenant for those arrears of rent, it may be doubted whether the incoming tenant is entitled to deduct anything but rent (*ib.*; see *per* Brett, J.), for the agreement does not in theory affect the landlord's remedies against the outgoing tenant (*Petrie v. Daniel*, 1 Smith, 199); though on principle it is submitted that the incoming tenant ought to be entitled to deduct and hand over to the landlord any sums which, on an adjustment of claims, the landlord would be entitled to set off against the outgoing tenant's claim.

In an action between outgoing and incoming tenants on a contract to pay according to the terms of the lease, the lease must be put in on the part of the plaintiff. (*Tanner v. Washburne*, 1 F. & F. 330.)

In *Fariell v. Gaskoin* (21 L. J., Ex. 85), Martin, B., said, "The landlord is liable on his special contract, but the tenant may be liable by reason of his having had the benefit of the tillages from the outgoing tenant." This doctrine of implied contract must be accepted with the qualification that the alternative remedy against the incoming tenant only lies when the express contract between the landlord and outgoing tenant no longer subsists, by reason of the new implied contract between outgoing and incoming tenants. (*Codd v. Brown*, 15 L. T., N. S. 536.) It is a question of fact, to be decided upon the special circumstances of each case, whether or not there has been such a new contract. (*Ib.*) No such contract is implied from the mere fact of the incoming tenant entering on the land; nor of his appointing a valuer if such appointment be made on behalf of the landlord, and on the understanding that the landlord is to pay (*ib.*); though the appointment of a valuer, if unexplained, is some evidence of a contract to pay. (*Stafford v. Gardner*, L. R., 7 C. P. 242.)

Implied contract of incoming to pay outgoing tenant.

The benefit of a contract as to off-going rights passes with the reversion. An agreement by an incoming tenant to pay interest on the amount instead of paying the incom-

The benefit of a contract as to off-going rights passes

with the
reversion.

ing valuation itself, and upon quitting to leave a valuation of tenant-right equal in value, and of the same nature and kind as that found upon his entry, was held not to create a personal debt to the original lessor, but to enure to the benefit of a subsequent landlord. (*Wagstaff v. Clinton*, Cab. & E. 45.)

An injunction will be granted to prevent a tenant from removing crops, manures, &c., contrary to the custom of the country. (*Onslow v. —*, 16 Ves. 173.)

SECT. 4.—*Tenants' Compensation Acts.*

(a) *The Agricultural Holdings Acts, 1875 and 1883.*

The reason that induced the Courts to recognize the tenant's claim to emblements and away-going crops, viz, the encouragement of agriculture, has induced the legislature to provide, by the Agricultural Holdings Acts, 1875 and 1883, for the compensation of outgoing tenants for certain unexhausted improvements.

In what cases
38 & 39 Vict.
c. 92, applies.

The Act of 1875 (38 & 39 Vict. c. 92), which was limited to England and Wales, commenced as from the 14th of February, 1876 (s. 2), and applied only to improvements executed after the commencement of the Act (s. 5), upon holdings, either agricultural or pastoral, not less than two acres in extent. (Sect. 58.) It did not apply to a tenancy *for a term* existing at the commencement of the Act, but did to a tenancy from year to year so existing unless within two months after the 14th of February, 1876, written notice to the contrary was given by either landlord or tenant. (Sect. 57.)

Application
to future
tenancies.

As to tenancies created after the commencement of the Act, ss. 54 and 56 must be read together; for s. 56 provided that the Act should apply to every contract of tenancy beginning after the commencement of the Act, *unless the parties agreed in writing in the contract of tenancy or otherwise that the Act or any part or provision thereof should not apply to the contract*; while s. 54 provided that nothing in the Act should prevent the parties from entering into and carrying into effect any such agreement as they should think fit, *or should interfere with the operation thereof*. The joint operation of these sections would seem to be that any

provision in a lease or contract of tenancy, inconsistent with the provisions of the Act, would to that extent exclude the operation of the Act, though the parties might not in terms have declared that the Act or any part thereof should not apply. The parties might by reference adopt a part without the whole of the Act. (Sect. 55.)

Save as expressly therein provided, the Act did not affect the rights and remedies of either party under the custom of the country, contract of tenancy, or other contract, or otherwise (s. 60), but provided that the tenant should not claim compensation under the Act and under the custom of the country in respect of the same thing. (Sect. 59.)

The Act provided for compensation in the case of three classes of improvements executed after the commencement of the Act, and not exhausted at the determination of the tenancy. The first class included:—drainage of land, erection or enlargement of buildings, laying down permanent pasture, making and planting osier beds, making water meadows or works of irrigation, making gardens, making or improving roads or bridges, making or improving watercourses, ponds, wells, or reservoirs, or works for the supply of water for agricultural or domestic purposes, making fences, planting hops, planting orchards, reclaiming waste lands, and warping land. (Sect. 5.) The tenant was not entitled to compensation unless these improvements were executed with the previous consent in writing of the landlord. (Sect. 10.) The improvements were to be deemed exhausted at the end of twenty years. (Sect. 6.) The compensation was to be the amount laid out, less a deduction of one-twentieth for each year the tenancy endured after the year of outlay; or when the landlord was not at the time of consent absolute owner, the compensation should “not exceed a capital sum fairly representing the addition which the improvement, as far as it continues unexhausted at the determination of the tenancy, then makes to the letting value of the holding.” (Sect. 7.)

Improve-
ments of
first class.

Improvements of the second class were: boning land with undissolved bones, chalking land, clay burning, claying, liming and marling land. (Sect. 5.) Notice must have been given in writing to the landlord not more than forty-two nor less than seven days before executing the improvement; and if executed after notice to quit, it must have been done with the previous consent in writing of the landlord. (Sect. 12.) These improvements were to be

Second class.

deemed exhausted at the end of seven years (s. 6); and the compensation was "the sum *properly* laid out by the tenant on the improvement," less one-seventh part for each year after the year of the outlay. (Sect. 8.)

Third class.

Improvements of the third class were: application to the land of purchased artificial or other purchased manure, and consumption on the holding by cattle, sheep or pigs, of cake or other feeding-stuff not produced on the holding. (Sect. 5.) The improvements were to be deemed exhausted at the end of two years. (Sect. 6.) The compensation was "such proportion of the sum *properly* laid out by the tenant, as fairly represents the value thereof at the determination of the tenancy to an incoming tenant." (Sect. 9.) But no compensation was to be allowed when the tenant had taken from the portion of the holding on which the improvement was executed "a crop of corn, potatoes, hay or seed, *or any other exhausting crop.*"

Agricultural Holdings Act, 1883.

The rights of compensation conferred by the Act of 1875 have been extended by the Agricultural Holdings Act, 1883. (46 & 47 Vict. c. 61.) This Act, which is also limited to England and Wales, came into force on the 1st of January, 1884. (Sect. 53.) From that time the Agricultural Holdings Act of 1875 is repealed, with a saving proviso in favour of proceedings pending and rights acquired under the repealed Act. (Sect. 62.)

Repeal of Act of 1875.

Act applies only to holdings of "land."

It is not every tenancy, even in agricultural districts, that will be affected by the Act. The Act has no application to anything but a "holding," which is defined to mean "any parcel of *land* held by a tenant" (sect. 61), nor to a holding "that is not either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden, or to any holding let to the tenant during his continuance in any office or employment held under the landlord." (Sect. 54.)

When "land" with buildings on is within the Act.

The combined effect of sects. 54 and 61 might, at first sight, seem to exclude land on which there are houses and farm or other buildings. But in all Acts of Parliament the word "land" includes houses and buildings, unless there are words to exclude houses and buildings. (52 & 53 Vict. c. 63, s. 3.) And although it would be straining language to speak of a house as either an agricultural or pastoral house, it is obvious the Act was intended to apply to some holdings which include buildings, since it provides

for compensation for the "enlargement of buildings." (Sched. 1 (1).) It is submitted that the Act would be held to apply to any holding which included buildings where the land, if demised alone, would fall within the Act, and is the principal part of the holding, the buildings being accessorial to the more complete enjoyment of the land; but would not apply where the building is the principal part of the holding, and the land, notwithstanding it might fall within the Act if demised alone, is merely accessorial, as in the case of a few acres of land let with a country mansion, or a small garden let with a cottage. This view seems to have been adopted in a case in the county court. (*Morley v. Jones*, 32 Sol. J. 630.)

The words "agricultural" and "pastoral," as applied to a tenancy, are used in the Act without any definition. "Agricultural" probably means cultivated by tillage, and although "pastoral" is a misapplication, it probably means land in grass for feeding purposes. (*Per Lord Fitzgerald, Westropp v. Elligott*, 9 App. Cas. 815; 52 L. T. 153.)

"Agricultural or pastoral."

It is impossible to lay down any rule as to what amount of selling garden produce by a tenant will make his holding "in part cultivated as a market garden," so as to bring it within the Act. (See *Ex parte Hammond*, De Gex, 93; 14 L. J., Bkey. 14; *Purser v. Worthing Local Board*, 18 Q. B. D. 818; 56 L. J., M. C. 78.) It is submitted, however, that the Act only applies where the tenant carries on a regular *bonâ fide* trade as a market gardener, and that mere isolated sales of surplus produce, over and above that which the tenant may require for his own use, will not bring a holding within the Act. (See *Ex parte Sully, Re Wallis*, 33 W. R. 733; 52 L. T. 625.)

"Market garden."

The Act applies to Crown lands and lands of the Duchies of Lancaster and Cornwall. (Sects. 35, 36, 37.)

Crown and Duchy lands.

The Act of 1875 was restricted in its application to holdings of not less than two acres in extent. There is no such restriction in the Act of 1883.

No restriction in respect of acreage.

A tenant is defined as the "holder of land under a landlord for a term of years, or for lives, or for lives and years, or from year to year." (Sect. 61.) A tenancy at will or for a less period than from year to year is not within the Act.

Class of tenancies, as regards duration, within the Act.

The provisions of the Act as to compensation are, to a certain extent, retrospective, that is to say, the tenant shall be entitled to compensation if his tenancy determines on

Retrospective nature of the Act.

or after the commencement of the Act. (Sect. 1.) But as to improvements executed before the commencement of the Act, this right to compensation is limited—*first*, in respect of improvements of the class mentioned in the third part of the first schedule, to those executed within ten years before the 1st of January, 1884, and in respect of which the tenant is not otherwise entitled to compensation; and, *secondly*, in respect of the other classes of improvements, to those executed within the like period, and in respect of which the tenant is not otherwise entitled to compensation, and the landlord, within one year after the commencement of the Act, declares in writing his consent to the making of such improvements. (Sect. 2.)

Compensation for exhausted improvements.

The operation of the Act so far as regards the first-mentioned right to compensation is a little peculiar. Under the Act of 1875, those improvements would have been deemed to be exhausted as to part at the end of two years, and as to the rest at the end of seven years. (*Ante*, p. 414.) Therefore, it seems compensation may be payable under the Act, in respect of improvements which, at the commencement of the Act, ought to be deemed exhausted under the repealed Act.

To what extent parties may contract themselves out of the Act.

The Agricultural Holdings Act, 1875, was permissive. The Act of 1883 has been regarded as compulsory, but it will be found on examination that even its provisions as to compensation are not strictly so.

It is provided by sect. 55, that “any contract, agreement, or covenant made by a tenant, by virtue of which he is deprived of his right to claim compensation under this Act in respect of any improvement mentioned in the first schedule hereto (*except an agreement providing such compensation as is by this Act permitted to be substituted for compensation under this Act*), shall, so far as it deprives him of such right, be void both at law and in equity.” The words in italics modify very materially what might otherwise seem to be a stringent provision, for of the three classes of improvements dealt with by the Act, as to those mentioned in Parts 1 and 2 of Sched. 1, the parties may, upon whatever terms they like, contract themselves out of the Act. (Sects. 3, 4.) As to the improvements mentioned in Part 3 of the Schedule, the parties may contract themselves out of the Act by an agreement in writing executed after the commencement of the Act, which secures to the tenant fair and reasonable compensation, having regard to

the circumstances existing at the time of making such agreement. (Sect. 5.)

The compensation to be paid by the landlord is only in respect of certain definite improvements of the classes specified in the first schedule of the Act. (Sect. 1.)

Except as to those definite improvements, the rights of landlord and tenant in respect of any improvements, emblements, tillages, and away-going crops, under contract or custom, are unaffected by the Act. (Sects. 57, 60.)

In respect of matters for which the Act provides compensation, the tenant shall not be entitled to claim compensation by custom or otherwise than in manner authorized by the Act. (Sect. 57.) And if the tenant neglect to claim in the mode provided by the Act he cannot, in an action brought by the landlord, counterclaim in respect of compensation provided by the Act. (*Gaslight and Coke Co. v. Holloway*, 52 L. T. 434; *Schofield v. Hincks*, 60 L. T. 573; 58 L. J., Q. B. 147.)

The compensation is only to be paid on the tenant quitting his holding at the determination of his tenancy (sect. 1), whether it determines by reason of effluxion of time or from any other cause (sect. 61); and the right to compensation enures to the benefit of the tenant's executors, administrators, assigns, or trustees in bankruptcy. (Sect. 61.) But a trustee in bankruptcy who disclaims cannot claim compensation under this Act. (*Schofield v. Hincks*, 60 L. T. 573.)

The improvements are of three classes:—*First*, the erection or enlargement of buildings and other permanent alterations specified in Part I. of the first schedule; *second*, drainage; *third*, boning and manuring the land, and other improvements which feed the soil, as specified in Part III. of the first schedule.

In dealing with compensation, the Act distinguishes between improvements executed before and those executed after the commencement of the Act. As to improvements of the first and second class executed within ten years before the 1st of January, 1884, and for which the tenant is not otherwise entitled to compensation, if the landlord within one year after the 1st of January, 1884, declare in writing his consent to the making of such improvements, the tenant may claim compensation under the Act on quitting his holding at the termination of his tenancy. (Sect. 2, sub-sect. 2.) As to improvements of the third class

Compensation only in respect of defined improvements.

Act does not affect other away-going rights;

but as to those improvements the Act is exclusive.

Compensation payable on tenant quitting.

Improvements of three classes.

Improvements executed before 1st January, 1884.

made within ten years before the 1st of January, 1884, and for which the tenant is not otherwise entitled to compensation, he may, on quitting his holding, claim compensation. (Sect. 2, sub-sect. 1, *ante*, p. 416.)

Improve-
ments after
1st January,
1884.

Improvements executed after the Act commenced are distinguished according to whether the contract of tenancy was current at the commencement of the Act or began after.

Under current
tenancy.

As to "a contract of tenancy current at the commencement of the Act" (see sect. 61), if any agreement in writing, or custom, or the Act of 1875, provides specific compensation for improvements of any of the three classes, such compensation shall be substituted for that provided by the Act. (Sect. 5.)

Under a
tenancy com-
mencing after
the Act.

In the case of improvements executed after the 1st of January, 1884, under contracts of tenancy beginning after that date, or under contracts then current, but not providing for specific compensation, the right to compensation is subject to slightly different conditions.

First class,
Sched. I.,
Part 1.

Compensation for improvements of the first class is only payable if the landlord or his agent, duly authorized in that behalf (that is, having express authority for that purpose, *Turner v. Hutchinson*, 2 F. & F. 185), has, previously to the execution of the improvements, consented thereto in writing. (Sect. 3.) Indeed, as to most of the improvements of this class, the tenant would be guilty of waste if they were done without the landlord's sanction. The Act allows an agreed compensation to be substituted for that provided by the Act. (Sect. 3.)

Second class,
drainage.

No compensation is payable for the second class of improvements, unless the tenant has, not more than three months, and not less than two months (*i.e.*, calendar months, 13 & 14 Vict. c. 21, s. 4), before beginning to execute such improvement, given to the landlord or his agent, duly authorized in that behalf (see *Turner v. Hutchinson*, *supra*), written notice of his intention so to do, and of the manner in which he proposes to do the intended work, or unless the parties agree to dispense with any notice. The landlord and tenant may agree on the terms as to compensation or otherwise, and the agreed compensation shall be substituted for that provided by the Act. (Sect. 4.)

Third class,
Sched. I.,
Part 3.

No notice is necessary before doing the improvements of the third class, and the tenant shall be entitled to compensation under the Act, except when an agreement in

writing secures to the tenant "fair and reasonable compensation" for such improvements, "having regard to the circumstances existing at the time of making such agreement," in which case the agreed compensation shall be deemed to be substituted for that provided by the Act. (Sect. 5.)

This power to question the "fairness" and "reasonableness" of substituted compensation will no doubt cause considerable litigation.

"Fair and reasonable compensation."

There is no such thing as reasonableness in the abstract, and it is always necessary to take into consideration surrounding circumstances to ascertain whether or not a contract is reasonable. (*Lewis v. Great Western Rail. Co.*, 47 L. J., Q. B. 138; 3 Q. B. D. 212, *per* Cotton, L. J.)

When a contract is impeached on the ground that it does not provide "fair and reasonable compensation," the burden of proof as to reasonableness would seem to lie on the landlord.

The most cogent evidence in favour of reasonableness is to show that the agreement was not forced upon the tenant, and that he had a fair alternative of getting rid of it—as, for example, the right to compensation under the Act at an increased rent—but agreed to it. (See *Lewis v. Great Western Rail. Co.*, *supra*; *Manchester, Sheffield, &c. Rail. Co. v. Brown*, 8 App. Cas. 703; 53 L. J., Q. B. 124.)

The measure of compensation is "such a sum as fairly represents the value of the improvements to an incoming tenant," not taking into account as part of the improvement "what is justly due to the inherent capabilities of the soil." (Sect. 1.) The compensation is not necessarily limited to the amount expended by the tenant; but it is not clear to what extent the increased rental value caused by the improvements should be the basis of calculation.

The measure of compensation.

The tenant may add to his claim for compensation for improvements, a claim for compensation in respect of a breach of covenant or other agreement, connected with a contract of tenancy, committed by the landlord, and both are to be ascertained by the same proceedings. This at least seems to be the meaning of sect. 6 (d), and it is assumed that, in the case of a reference, the referees would not be entitled to award the tenant compensation in respect of any breaches of covenant or other matters which were not stated in his notice of claim under sect. 7. Neither

Tenant may add claim for breach of covenant to his claim for compensation.

could the referees in any event deal with anything but matters of *contract*.

Deductions
from tenant's
compensa-
tion.

From the amount of compensation payable to the tenant are to be deducted (1) any benefit allowed to the tenant in consideration of his executing the improvement (sect. 6 (a)); and (2) sums due for rent, waste, breaches of covenant or agreement connected with the contract of tenancy (committed not more than four years before the determination of the tenancy), taxes, rates, and tithe rent-charge due or becoming due in respect of the holding, and to which the tenant is liable (sect. 6 (c)); and (3) in the case of compensation for manures (*i. e.*, Nos. 22 and 23 in the schedule (sect. 61)), the value of the manure that would have been produced by the consumption on the holding of any hay, straw, roots, or green crops removed from the holding within the last two years of the tenancy, and for which a proper return of manure to the holding has not been made. (Sect. 6 (b).)

Improve-
ments by
tenant about
to quit.

A tenant is not entitled to compensation for improvements, other than for manures (*i. e.*, Nos. 22 and 23 in the first schedule (sect. 61)), begun by him within one year before he quits his holding, or at any time after he has received a final notice to quit (*i. e.*, one which results in his quitting), unless, in the case of a tenant from year to year, the improvements were commenced during the last year of his tenancy, but before notice to quit given by the landlord, or unless, in the case of any tenant, he has served written notice on the landlord of his intention to begin the improvements, and the landlord has either assented or failed for a month thereafter to object to the making of the improvements. (Sect. 59.)

Incoming
may purchase
outgoing
tenant's right
to compensa-
tion.

An incoming tenant may, with the consent of the landlord, pay the outgoing tenant any compensation payable under the Act, and stand in the place of the outgoing tenant on quitting the holding. (Sect. 56.)

Tenant hold-
ing through
successive
terms.

A tenant who has held through a succession of terms will be entitled to compensation though the improvements were made during a term prior to that which determines upon his quitting. (Sect. 58.) This at least seems to be the meaning of the somewhat peculiarly-worded 58th section.

Procedure.

The sections in the Act of 1883 which relate to procedure are a practical re-enactment of the procedure provisions in the Act of 1875. Those provisions were never

the subject of any reported judicial decision, and their construction upon many points is a matter not wholly free from difficulty.

The proceedings commence by the tenant, two [calendar] months at least before the determination of the tenancy, giving written notice to the landlord of his intention to make a claim. The landlord may before or within fourteen days after the determination of the tenancy give a written notice of counter-claim. (Sect. 7.) The landlord cannot initiate proceedings under the Act.

Notice of claim and counter-claim.

Both notice and counter-notice must state, as far as reasonably may be, the particulars and amount of the intended claim. As these notices form the basis of the subsequent proceedings, great care should be taken in framing them. In the first place they must be in writing, though it is not necessary they should be signed. It seems doubtful whether a notice contained in more than one paper would be sufficient. (See *Keen v. Millicall Dock Co.*, 51 L. J., Q. B. 277; 8 Q. B. D. 482.)

Form and nature of the notice.

The notices must state the "particulars and amount" of the claim. If the claim proceed to a reference, the referees would seem to be bound to confine themselves to the matters stated in the particulars. Should they, however, deal with matters not so stated, an injunction would not be granted to restrain them. (*North London Rail. Co. v. Great Northern Rail. Co.*, 52 L. J., Q. B. 380; 11 Q. B. D. 30.) But should they award in respect of matters not so included, and the case be one in which an appeal lies under sect. 23, their award may be impeached in that way. If no appeal lies, and an order for payment should be made by the county court under sect. 24, it is submitted that the order might be restrained by prohibition. (See *South Eastern Rail. Co. v. Railway Commissioners*, 50 L. J., Q. B. 201; 6 Q. B. D. 586; *Toomer v. London, Chatham and Dover Rail. Co.*, 47 L. J., Ex. 276; 2 Ex. D. 450.)

The notice may be served personally, or by leaving it at, or sending it by registered letter to, the person's last known place of abode in England. (Sect. 28.)

Service of notice.

If the parties agree upon the compensation the matter is settled; if they do not agree, it must go to a reference. (Sect. 8.) In addition to questions of compensation for improvements, questions as to compensation for the value of fixtures left on the holding by the tenant (sect. 34, subsect. 5), and as to the reduction of rent in respect of land,

Matters which may be referred under the Act.

of which possession is resumed by the landlord (sect. 41), are to be settled by reference under the Act, but without appeal.

Appointment
of referees.

The reference may be to a single referee, jointly appointed; or, if the parties cannot concur, then to two referees, one appointed by each party. (Sect. 9.)

Umpire.

Where two referees are appointed an umpire must be appointed. This appointment, on the requisition of either party at the time of appointing his referee, may be made either by the Land Commissioners for England or the county court, unless in the latter case the other party dissents from the umpire being so appointed, in which event he shall be appointed by the Land Commissioners. (Sect. 10. [Now the powers of the Land Commissioners are transferred to the Board of Agriculture, 52 & 53 Vict. c. 30, s. 2].) In all other cases the umpire is to be appointed by the referees before entering on the reference. (Sect. 9, sub-sect. 7.) In case of his death or incapacity the referees must appoint another; on their failure to do so the county court may appoint one. (Sect. 9.) The before-mentioned powers of the county court are exercisable by the judge or by the registrar with the consent of the parties. (Sect. 11.) The application is by summons. (C. C. R. 1889, Ord. XL., r. 7.)

“County
court.”

County court means the court within the district whereof the holding or the larger part thereof is situate.

Mode of
submission.

The delivery to a referee of his appointment shall be deemed a submission to a reference by the party delivering it. The submission is irrevocable except by consent of the other party. (Sect. 12.)

Evidence.

The referees and umpire have the ordinary power of arbitrators to require the production of documents and evidence, and to examine witnesses, who shall be punishable for perjury. (Sect. 13.)

Application
of Arbitration
Act, 1889, to
references
under this
Act.

The Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 24, enacts that such Act “shall apply to every arbitration under any Act passed before or after the commencement of this Act, as if the arbitration were pursuant to a submission, except in so far as this Act is inconsistent with the Act regulating the arbitration, or with any rules or procedure authorized or recognized by that Act.” (*Re Knight and Tabernacle Permanent Building Society*, [1891] 2 Q. B. 63; [1892] A. C. 298; 60 L. J., Q. B. 633.) This would enable either party to require the referee to state a special case. (*Ib.*)

There is power to proceed in the reference *ex parte*, after notice given to the parties. (Sect. 14.) This course should not be adopted where there is reasonable excuse for a party's non-attendance. (Redman, Arb. 135, 2nd ed.)

Proceeding
ex parte.

The award must be in writing (sect. 15) and made, ready for delivery, in the case of a single referee, within twenty-eight days after appointment, in the case of two referees within twenty-eight days after the last of the two appointments, or within such extended time not exceeding twenty-one days longer as they may by writing jointly appoint. (Sect. 16.) If the two referees fail to award within the time aforesaid, their authority shall cease, and the matter shall stand referred to the umpire, who shall make his award within twenty-eight days after notice to him in writing; this time may be extended by the registrar of the county court. (Sect. 18.)

The award,
time for,

The award should be carefully drawn. It must not award compensation generally, but must deal specifically with the several matters referred, and, where the landlord desires to charge his estate with the compensation found due to the tenant, specify the time at which the compensation is to be deemed exhausted. (Sect. 19.) The award may deal with the costs of the reference (sect. 20), and shall fix a day not sooner than one [calendar] month after delivery of the award for payment of money awarded for compensation costs, or otherwise (Sect. 21; for form of award see Redman, Arb. 366, 2nd ed.)

must be
specific, not
general.

The costs of the reference are in the discretion of the referees or umpire, and are subject to taxation by the registrar of the county court. (Sect. 20.)

Costs.

"An award shall not be questioned otherwise than as provided by this Act" (sect. 22), that is, by appeal. This does not, it is submitted, take away the right of either party to proceed by prohibition where the referees or umpire act in excess of their authority. (*Ante*, p. 421.)

Mode of im-
peaching
award.

An appeal lies against an award "where the sum *claimed* for compensation exceeds 100%." (sect. 23), irrespective of the amount actually awarded. It seems that the tenant's claim must exceed 100%, for it is the only claim which in section 7 is spoken of as a claim for "compensation." But it was held by Judge Turner in *Wharton v. Wilson* (79 L. T. Jour. 367), that an appeal lies also where the landlord's claim exceeds 100%. He further held that on an appeal fresh evidence might be given.

Appeal, when
it lies.

Notice of appeal must be given within seven days after delivery of the award. The appeal is to the county court judge.

The appeal is limited to the four "grounds" stated in section 23, but the first ground, viz., "that the award is invalid," will always be alleged, and with particulars of the invalidity will be sufficient upon which to impeach the award on any of the ordinary grounds for setting aside an award. (See Redman, Arb. 255, 2nd ed.)

There is no appeal upon facts only. (*Smith v. Acock*, 79 L. T. Jour. 298; see also *Brunskill v. Atkinson*, 29 Sol. J. 29.)

By the County Court Rules, 1889 (Ord. XL.), applicable to appeals under the Agricultural Holdings Acts, 1875 and 1883, it is provided that the appellant shall, within *eight* days after the delivery of the award, file a copy thereof, with a concise statement in writing of his grounds of appeal, containing the particulars mentioned in the rule. (R. 2.) The Act of 1883, s. 23, limits the time of appeal to *seven* days. It will be a wise precaution to keep within that time. Within twenty-four hours after the filing of the statement the registrar shall transmit a copy to every respondent. (R. 3.) The respondent shall, within eight days after such transmission, deliver to the registrar a statement, signed by himself or his solicitor, showing whether he disputes the validity in law of any and which of the objections to the award, or of the truth in fact of any and which of the grounds of appeal, or admits the validity in law and truth in fact of any and which of the grounds of appeal, and whether he prays that the case may be remitted to be reheard. (R. 4.) A copy of the award, grounds of appeal, and respondent's statement, are to be transmitted by the registrar to the judge, who shall appoint a time and place for hearing. (R. 5.) Rule 6, that the judge shall hear and determine the appeal, and the order thereupon may be enforced in the same manner as any other judgment of the Court must be read in connection with sect. 23 of the Act of 1883, which provides that the judge shall hear the appeal, and may remit the case in whole or in part to the referees or umpire; and that the decision of the judge shall be final, save that he *shall* at the request of either party state a special case for the High Court on a *question of law*. (Sect. 23.)

Costs in the
county court.

Costs of proceedings in the county court are in the dis-

cretion of the Court, and are to be taxed by the registrar. (Sect. 27.)

Money agreed, awarded, or ordered on appeal to be paid for compensation, costs, or otherwise, if not paid within fourteen days shall be recoverable, upon order made by the county court judge, as upon an ordinary judgment of the county court. (Sect. 24.)

Compensation, how recoverable,

Where, however, the landlord is a trustee, the amount shall not be recoverable against him personally, but shall be a charge on the holding (sect. 31), and he may obtain from the county court a charge on the holding. (*Ib.*) This charge, if in respect of improvements of the first or second class, must be registered under the Lands Charges Registration Act, 1888 (53 & 54 Vict. c. 57, s. 3). In the case of trustees of ecclesiastical or charity lands these powers of charging the land can only be exercised with the previous approval in writing of the Charity Commissioners (sect. 40), which should be produced upon the application to the county court.

in the case of a trustee.

The Act contains beneficial provisions in favour of tenants for life, and other limited owners whose estate in the property may determine before the compensated improvement may have been exhausted. In addition to the power given to limited owners to consent and contract as if they were owners of the fee, or in the case of leaseholds, possessed of the whole leasehold estate (sect. 42), it is provided that a landlord on paying compensation, or on expending money on drainage, may obtain from the county court a charge on the holding in respect of the sum paid or expended. (Sect. 29.) This charge may be assigned to a company incorporated by Parliament, and having power to advance money for the improvement of land (sect. 32); but the charging power in the case of lands belonging to a See can only be exercised with the written approval of the Estates Committee of the Ecclesiastical Commissioners (sect. 38), and in the case of glebe land, or other land belonging to an ecclesiastical benefice, with the previous written approval of the patron, or of the Governors of Queen Anne's Bounty, who may pay the compensation and obtain a charge on the holding. (Sect. 39.)

Charge upon holding in favour of limited owner.

Lands of a See, of a benefice.

Under the Settled Land Act, 1882 (45 & 46 Vict. c. 38), moneys raised by the sale or mortgage, &c., of settled land, are called capital moneys arising under the Act, and are thereby authorized to be applied for different purposes,

Capital money under Settled Land Act, 1882, applied for

improvements.

and, amongst others, by the 25th section of the Act, for the execution, on land held under the same settlement, of certain improvements. By the Act of 1883 it is provided that such capital moneys may be applied in payment of any moneys expended and costs incurred by a landlord, or in discharge of a charge created on a holding in respect of the execution of any improvements mentioned in the first and second parts of the first schedule. (Sect. 29.)

Nature of the charge created.

When the landlord is a tenant in fee simple, or in tail, or a tenant for life, a charge upon the holding will be a charge upon the fee simple: if the landlord is only himself a tenant as defined by the Act (*i.e.*, for a term of years or for lives, or for lives and years, or from year to year (sect. 61)), the charge shall not extend beyond his interest. (Sect. 30.)

(b) *The Allotments Compensation for Crops Act, 1887.*

The Allotments and Cottage Gardens Compensation for Crops Act, 1887 (50 & 51 Vict. c. 26), is a miniature Agricultural Holdings Act. It applies only to a holding of any parcel of land not more than two acres in extent, "held by a tenant under a landlord and cultivated as a garden or as a farm, or partly as a garden and partly as a farm." (Sect. 4.)

Matters for compensation.

The tenant of such a holding is entitled upon the determination of his tenancy, notwithstanding any agreement to the contrary, to obtain from the landlord compensation in money:—

- (a) For crops, including fruit, growing upon the holding in the ordinary course of cultivation, and for fruit trees and fruit bushes growing thereon, which have been planted by the tenant with the previous consent in writing of the landlord.
- (b) For labour expended upon and for manure applied to the holding since the taking of the last crop therefrom in anticipation of a future crop.
- (c) For drains, and for any outbuildings, pig-sties, fowl-houses, or other structural improvements made by the tenant upon his holding with the written consent of his landlord. (Sect. 5.)

Deductions from compensation.

In ascertaining the amount of compensation payable to the tenant any sum due to the landlord in respect of rent,

or of any breach of the contract of tenancy, or wilful or negligent damage committed or permitted by the tenant, shall be taken into account in reduction of the compensation. (Sect. 6.)

If the parties do not agree upon the amount and time of compensation, it is to be settled by an arbitrator. (Sect. 7.) If they do not concur in the appointment of an arbitrator, they or either of them may apply to the justices of the peace acting in the petty sessional division in which the holding is situated, and such justices are to appoint one of their number, not being interested in the holding, or other competent person not being interested as aforesaid, to be arbitrator (sect. 8), whose consent, in all cases in which it is practicable, shall be obtained to act without remuneration, and in other cases they shall fix his reasonable remuneration. (Sect. 9.)

Appointment
of arbitrator.

The arbitrator must proceed to act within seven days after his appointment (sect. 10), and has power to take evidence, and administer oaths, and take affirmations (sect. 11), and to proceed *ex parte* after notice (sect. 12), and must make his award in writing within fourteen days after his appointment, unless the parties extend the time to twenty-eight days. (Sect. 13.)

Power of
arbitrator.

The award may deal with the costs of the arbitration (sect. 14), and must fix a day, not sooner than fourteen days after delivery of the award, for payment of the money awarded. (Sect. 15.) It is final and conclusive (sect. 16), and any money awarded to be paid shall be recoverable upon order made by the judge of the county court within the district of which the holding is situate, as money ordered to be paid by a county court under its ordinary jurisdiction. (Sect. 17.)

The award.

In the case of an allotment let by a sanitary authority under the Allotments Act, 1887 (51 & 52 Vict. c. 48), if the tenancy is determined by the authority under the provisions of that Act, the compensation is to be assessed by an arbitrator appointed by such authority, or if the tenant so elect, by an arbitrator appointed under the Allotments Compensation for Crops Act, 1887, or the Agricultural Holdings Act, 1883. (Sect. 8, sub-s. 2.)

Recovery of
amount
awarded.

Allotments let
by a sanitary
authority.

(c) *The Tenants' Compensation Act, 1890.*

The next Act providing compensation for agricultural tenants was the Tenants' Compensation Act, 1890 (53 & 54 Vict. c. 57), the principal object of which was to enable a tenant to obtain compensation under the Agricultural Holdings Act, 1883, or the Allotments and Cottage Gardens Compensation for Crops Act, 1887 (therein referred to as the principal Acts), in a case in which the land is in mortgage and the tenancy is void as against the mortgagee.

The second section enacts as follows:—

“Where a person occupies land under a contract of tenancy with the mortgagor, whether made before or after the passing of this Act, which is not binding on the mortgagee of such land, then—

“(1.) The occupier shall, as against the mortgagee who takes possession, be entitled to any compensation which is, or would but for the mortgagee taking possession be due to the occupier from the mortgagor as respects crops, improvements, tillages, or other matters connected with the land, whether under the principal Acts or the custom of the country, or agreements sanctioned by the principal Acts:

“Provided that any sum ascertained to be due to the occupier for such compensation or for any costs connected therewith, may be set off against any rent or other sum due from him in respect of the land, and recovered as compensation under the principal Acts, but unless so set off shall, as against the mortgagee, be charged and recovered in accordance only with section thirty-one of the Agricultural Holdings Act, 1883, as if the mortgagee were the landlord within the meaning of that section.

“(2.) Before the mortgagee deprives the occupier of possession of the land otherwise than in accordance with the said contract, he shall give to the occupier six months' notice in writing of his intention so to deprive him; and if he so deprives him, compensation shall be due to the occupier for his crops, and for any expenditure upon the land which he has made in the expectation of holding the land for the full term of his contract of tenancy, in so far as any

improvement resulting therefrom is not exhausted at the time of his being so deprived, and such compensation shall be determined in like manner as compensation under the principal Acts, and shall be set off, charged, and recovered in manner before provided in this section. This sub-section shall only apply where the said contract is for a tenancy from year to year, or for a term of years not exceeding twenty-one, at a rack-rent."

SECT. 5.—*Tenant's Liability for holding over.*

Where there is a demise of a house or premises, there is an undertaking express or implied by the tenant that he will at the expiration of the term deliver up possession to the landlord. (*Henderson v. Squire*, 38 L. J., Q. B. 73; L. R., 4 Q. B. 170.) If he neglect to do so, the landlord is entitled by way of damages to the actual amount of loss he has sustained. (*Watson v. Lane*, 11 Ex. 769; 25 L. J., Ex. 101.) Thus, if he has let the premises to another, and has to pay damages on account of not being able to give possession, the tenant is liable for such damages and costs. (*Bramley v. Chesterton*, 27 L. J., C. P. 23; 2 C. B., N. S. 592.) The tenant is also responsible for the act of his sub-tenant in holding over, and until absolute possession is given, continues liable for rent (*Harding v. Crethorn*, 1 Esp. 47; *Ibbs v. Richardson*, 9 A. & E. 849), and will have to bear the costs of an ejectment against the under-tenant (*Henderson v. Squire*, *supra*), and other special damage including a sum equivalent to the loss of rent resulting from possession not having been delivered.

Lessee bound to deliver up premises.

Where premises are let for a certain term to two persons, and at the end of the term one of them holds over with the assent of the other, both will be liable for the time during which the one holds over. (*Christy v. Tancred*, 7 M. & W. 127; 9 *ib.* 438; *Tancred v. Christy*, 12 *ib.* 316.) But one tenant cannot make his co-tenant liable by holding over without his assent. (*Draper v. Crofts*, 15 M. & W. 166.) The co-tenant so holding over, however, becomes liable as a tenant on sufferance to pay the landlord for the use and occupation of the premises. (*Leigh v. Dickeson*, 15 Q. B. D. 60; 54 L. J., Q. B. 18.)

Liability for co-tenant holding over.

After the expiration of the tenancy any third person continuing in occupation, *e.g.*, a bill of sale holder, for the purpose of selling effects on the premises, may be treated as a trespasser. (*Smith v. Brown*, 48 L. J., Ch. 694.)

If the tenant, with the consent of the landlord, continue in possession, a new tenancy is created. (*Ante*, p. 2.) But mere continuance in possession against the will of the landlord, after the determination of the tenancy without acceptance of rent by the landlord does not constitute a new tenancy. (*Cusack v. Farrell*, 18 L. R., Ir. 494; 20 *ib.* 56.)

Obtaining
possession by
re-entry.

A person wrongfully holding possession of hereditaments cannot treat the rightful owner who enters as a trespasser. (*Butcher v. Butcher*, 7 B. & C. 402.) After a tenancy has determined, any act of the landlord showing an intention to take possession is sufficient to re-vest the possession in him, and thenceforth the tenant and those claiming under him are wrongfully in possession and liable to be treated as mere trespassers. (*Hey v. Moorhouse*, 6 Bing. N. C. 52; *Jones v. Chapman*, 18 L. J., Ex. 456; 2 Ex. 803.) The landlord may assert his right to possession by entry, and expel the tenant. This, subject to the provisions of sect. 14 of the Conveyancing Act, 1881, he may do either by peaceably taking possession (*Taunton v. Costar*, 7 T. R. 431), by breaking open the door of a house which the tenant has vacated (*Turner v. Meymott*, 1 Bing. 158), or, even if the tenant and his family remain in possession, the landlord may enter forcibly and put him out, first requesting him to go, and in case of refusal using only such force as is necessary to overcome his resistance. For a breach of the peace committed in making a forcible entry and expulsion the landlord may become liable to an indictment for breach of the peace, but he will not be liable to the other person in damages for trespass and assault. (*Davison v. Wilson*, 11 Q. B. 890; 17 L. J., Q. B. 196; *Harvey v. Brydges*, 14 M. & W. 437, 442; 1 Ex. 261; *Delany v. Fox*, 26 L. J., C. P. 5; *Loics v. Telford*, 1 App. Cas. 414; 45 L. J., Ex. 613; 35 L. T. 69; *Scott v. Brown*, 51 L. T. 746.) So far as *Newton v. Harland* (1 M. & Gr. 644) is a decision that the landlord would be liable to an action for forcible entry and expulsion, it must be considered as practically overruled. (*Blades v. Higgs*, 30 L. J., C. P. 347; 10 C. B., N. S. 713.) For independent wrongful acts done in the course of or after the forcible entry the landlord will be liable to an action. (*Beddall v. Mait-*

land, 17 Ch. D. 174; 50 L. J., Ch. 401; *Edwick v. Hawks*, 18 Ch. D. 199; 50 L. J., Ch. 577; *Pollen v. Brewer*, 7 C. B., N. S. 371.) But not for injury resulting merely from the tenant's obstinacy in remaining in possession. (*Jones v. Foley*, [1891] 1 Q. B. 730; 60 L. J., Q. B. 464.) Thus, where a tenant held over and refused to give up possession on the expiration of his term, and the landlord who wished to re-build the premises removed the roof, and in the course of such removal part of the roof fell and damaged the furniture, this was held not to be a forcible entry or give any right of action to the tenant. (*Ib.*)

It is, however, always dangerous to trust to force to obtain possession, and where it cannot be obtained without personal violence, the wiser course is to proceed by ejectment. (See *post*, Chap. XI.)

The statute 5 Ric. 2, c. 8, s. 1, provides that "none from henceforth make any entry into lands and tenements but in case where entry is given by the law, and in such case not with strong hand nor with multitude of people, but only in peaceable and easy manner;" and in *Edwick v. Hawkes* (*supra*), it was held that a licence by the tenant to the landlord to make a forcible entry was void, as being a licence to commit a crime under the above statute.

In addition to his other liabilities, a tenant may, by holding over, become responsible for double value or double rent.

By 4 Geo. 2, c. 28, s. 1, it is enacted, that "In case any tenant or tenants for *any term of life, lives, or years*, or other person or persons who are or shall come into possession of any lands, tenements, or hereditaments, by, from, or under, or by collusion with such tenant or tenants, shall wilfully hold over any lands, tenements or hereditaments after the determination of such term or terms, and *after demand made and notice in writing given* for delivering the possession thereof, by his or their landlords or lessors, or the person or persons to whom the remainder or reversion of such lands, tenements or hereditaments shall belong, his or their agent or agents thereunto lawfully authorized [including a receiver appointed by the Court (*Wilkinson v. Colley*, 5 Burr. 2694), and a receiver appointed by the parties under a mortgage deed (*Poole v. Warren*, 8 A. & E. 582)], then and in such case, such person or persons so holding over shall, for and during the time he, she or they shall so hold over, or keep the person or persons entitled

out of possession of the said lands, tenements or hereditaments as aforesaid, pay to the person or persons so kept out of possession, their executors, administrators, or assigns, at the rate of double the yearly value of the lands, tenements, and hereditaments so detained, for so long as the same are detained," to be recovered by action, and against the recovering of which said penalty there shall be no relief in equity.

This is a penal statute, and is to be construed strictly, and the action does not lie against a weekly tenant who is not a tenant "for life, lives, or years" (*Lloyd v. Rosbee*, 2 Camp. 453), nor against a quarterly tenant (*Wilkinson v. Hall*, 3 Bing. N. C. 531.) But it does lie against a yearly tenant. (See *Lake v. Smith*, 1 B. & P. N. R. 174.) The Act applies only to a "wilful" and contumacious holding over, and not to a holding over under a *bonâ fide* mistake as to the tenant's own rights (*Wright v. Smith*, 5 Esp. 203); provided the mistake was a reasonable one to make (*Hirst v. Horn*, 6 M. & W. 393), or where there is a dispute as to the landlord's title (*Swinfen v. Bacon*, 30 L. J., Ex. 33; 6 H. & N. 846); or where the premises are held over by a sub-tenant without the tenant's authority or assent. (*Rands v. Clark*, 19 W. R. 48.)

The remedy of double value is given only in case of a holding over after "a demand made and notice in writing given" by the landlord or his agent. But the requirement of the Act will be satisfied, in the case of a tenant from year to year, by a valid written notice to quit without further demand. (*Hirst v. Horn*, 6 M. & W. 393; *Page v. More*, 15 Q. B. 684.) In the case of a tenant for a term of years, the demand may be served either previous to the expiration of the term (*Cutting v. Derby*, 2 W. Bl. 1075), in which case the landlord would be entitled to double value from the end of the term (*ib.*), or the demand may be made within a reasonable time after, if the landlord have done no act in the meantime to acknowledge the continuation of the tenancy, and he will thereupon be entitled to double value as from the time of such demand. (*Cobb v. Stokes*, 8 East, 358.)

Double value being given by way of damages cannot be distrained for (*Timmins v. Rowlinson*, 3 Burr. 1605), but can be recovered by action in the High Court of Justice, or in the county court if the claim is not above 50*l.* (*Wickham v. Lee*, 18 L. J., Q. B. 21), and is recoverable after

the landlord has recovered in ejectment. (*Soulsby v. Nering*, 9 East, 310.) But as a claim for double value can now be joined with one for the recovery of land (R. S. C. Ord. XVIII., r. 2), the costs of a separate action would not be allowed. The action being for a penalty must be brought within two years (3 & 4 Will. 4, c. 42, s. 3), and it can only be maintained by the landlord or reversioner, and not by a new lessee whose term is to begin on the ending of the tenancy of the tenant holding over. (*Blatchford v. Cole*, 5 C. B., N. S. 514.) Acceptance of single rent before an action is brought by the landlord for the double value, may operate as a waiver of the landlord's claim to the double value; but if rent be accepted after such action has been brought, it is a question whether it has been received in part satisfaction of the double value, or as a waiver of it. (*Ryal v. Rich*, 10 East, 52, *per* Lord Ellenborough; *Doe v. Batten*, Cowp. 245; 9 East, 314 n.)

Action must be brought within two years.

The statute imposes payment of "double the yearly value." This is not necessarily double rent which might not in every case be adequate compensation. (*Soulsby v. Nering*, 9 East, 313; *Doe v. Jackson*, 1 Doug. 176.) In estimating value, only land and buildings can be included; and where part of a mill with driving power for machinery was let, double value in respect of the power was held not recoverable. (*Robinson v. Learoyd*, 7 M. & W. 48.)

Damages.

By 11 Geo. 2, c. 19, s. 18, it is provided, that "In case any tenant or tenants shall give notice of his, her or their intention to quit the premises by him, her or them holden, at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained, then the said tenant or tenants, his, her or their executors or administrators, shall from thenceforward pay to the landlord or landlords, lessor or lessors, double the rent or sum which he, she or they should otherwise have paid, to be levied, sued for, and recovered at the same time and in the same manner as the single rent or sum before the giving of such notice could be levied, sued for or recovered, and such double rent or sum shall continue to be paid during all the time such tenant or tenants shall continue in possession as aforesaid."

Double rent.

This Act, it will be observed, applies only where the tenant has given a notice binding upon him to quit at the expiration of the term specified in the notice, and upon

which the landlord might at that time act and bring ejectment. (*Johnstone v. Hudleston*, 4 B. & C. 935, *per* Bayley, J.) The notice to quit need not be in writing. (*Timmins v. Rowlinson*, 3 Burr. 1603.) A tenant holding over and paying double rent may quit at any time without a fresh notice to quit. (*Booth v. Macfarlane*, 1 B. & Ad. 904.) Double rent may be recovered by distress or by action, which, where the amount claimed does not exceed 50*l.*, may be brought in the county court. (*Wickham v. Lee*, 12 Q. B. 521.)

In *Sullivan v. Bishop* (2 C. & P. 359) it was decided that this statute does not apply to weekly tenancies. This seems to be a questionable decision, based upon a confusion of the statute we are now considering, and which *in* express terms applies to *all* tenants, with the statute 4 Geo. 2, c. 28, s. 1 (*ante*, p. 431), which is in terms limited to tenants for "life, lives or years." (And see Bullen, Distress, 116.)

SECT. 6.—*Adverse Claim to the Premises by Tenant under Statute of Limitations.*

Sometimes upon a claim for possession a landlord is met by the defence that his right has become barred by the Statute of Limitations.

Action within twelve years after right of entry accrued.

When right accrues.

Tenancies for a term of years.

No person shall make an entry or bring an action to recover any land, but within twelve years next after the time at which the right to make such entry or to bring such action shall have first accrued. (37 & 38 Vict. c. 57, s. 1.)

It is necessary, therefore, to ascertain when, in the case of different kinds of tenancies, the right of entry accrues.

When land is let upon a written lease, the landlord's right to re-enter or bring an action to recover the land accrues when his reversion becomes an estate in possession (3 & 4 Will. 4, c. 27, s. 3; 37 & 38 Vict. c. 57, s. 2); that is, when the lease determines. (*Doe v. Oxenham*, 7 M. & W. 131; *Chadwick v. Broadwood*, 3 Beav. 308.) Before the passing of the first mentioned Act it did not matter whether, during the term the rent was paid to the landlord, or to a stranger, or not paid at all: upon the determination of the lease, the right of action first accrued. The case of payment to a stranger under a written lease at

a rent amounting to twenty shillings now stands upon a different footing to mere non-payment of rent.

If a lease is in writing and the rent reserved amounts to the yearly sum of twenty shillings or upwards, and such rent shall have been received by some third person wrongfully claiming to be entitled to the reversion, and no payment in respect of the rent reserved shall afterwards have been made to the person rightfully entitled thereto, the latter's right of action shall be deemed to have first accrued upon the first of such wrongful payments, and not upon the determination of the lease. (3 & 4 Will. 4, c. 27, s. 9.) In such a case no title is acquired by the tenant but by the third person to whom he pays his rent. Receipt by a person under a supposed title, consistent with that of the rightful owner in reversion is not a wrongful receipt (*Shaw v. Keighron*, I. R. 3 Eq. 574); but it is otherwise when a person claims an inconsistent title by mistake. (*Williams v. Pott*, L. R., 12 Eq. 149.)

Payment of rent to a stranger.

The section does not apply to a lease in writing where the rent does not amount to twenty shillings, and as to such, notwithstanding payment to a stranger, the right of action only dates from the determination of the lease.

Except in the case of actual payment to a third person, the old rule is unaltered. The non-payment of rent by the tenant for however long, and notwithstanding he may claim the fee, does not prevent the landlord recovering at the end of the lease or within twelve years after. (*Doe v. Oxenham*, 7 M. & W. 131.) Moreover, as we have seen (*ante*, p. 279), non-payment for any length of time of rent under a lease is no bar to the recovery of such rent, except as to arrears beyond the period of limitation. (*Grant v. Ellis*, 9 M. & W. 113; *Archbold v. Scully*, 9 H. L. C. 360.)

Mere non-payment of rent.

Encroachments made by the tenant are treated as part of his holding. (*Ante*, p. 208.)

Where a lease is void or voidable in its inception the statute begins to run immediately upon possession being taken under it by the lessee. (*Magdalen Hospital v. Knotts*, 8 Ch. D. 709; 4 App. Cas. 324; 48 L. J., Ch. 579; *Doe v. Gower*, 17 Q. B. 589; 21 L. J., Q. B. 57; *Churcher v. Martin*, 42 Ch. D. 312; 61 L. T. 113.) But in the case of a lease voidable for breach of covenant, time does not run unless and from the time the lessor elects to treat the breach as a forfeiture.

Void lease.

In favour of trespasser against lessee, time only runs against lessor from expiration of lease.

Where the premises are sublet, and after the under-lease is determined, the under-lessee or a trespasser under him remains in possession, although a statutory title may be acquired against the lessee, time does not begin to run as against the head lessor until the determination of the head lease. (*Ecclesiastical Commissioners for England v. Treemer*, [1893] 1 Ch. 166; 68 L. T. 11.) Thus, where a lease granted in 1805 was in 1832 surrendered, and a new lease forthwith granted subject to an under-lease created in 1807, and which determined in 1874, after which time the sub-lessee and his vendee continued in possession without paying rent until the lease of 1832 determined in 1891, it was held that time only ran as against the lessor from the latter date. (*Ib.*) If at the date of the surrender and new lease, a trespasser had been in possession of the premises, time would have run from that date as against the head lessor, as well as against the lessee. (*Ecclesiastical Commissioners for England v. Rowe*, 5 App. Cas. 736; 49 L. J., Q. B. 771.)

Tenancy from year to year or other period without writing.

When a person shall be in possession or in receipt of the profits of any land, or in receipt of any rent as tenant from year to year, or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen.) (3 & 4 Will. 4, c. 27, s. 8.) This section applies to a tenant for years holding over, and in fact to every tenancy under an instrument which does not operate as a lease in writing.

Time runs from the last payment of rent, and where annual payments have been made, but the tenancy is disputed, the circumstances connected with the payments are very important, for if the person paying makes the payment expressly or impliedly on account of something else than rent, that would not be a payment of rent within the section. (*Att.-Gen. v. Stephens*, 6 De G., M. & G. 146.) A parol admission by an occupier that he is paying rent is sufficient evidence of payment within this section, and there is no necessity for a written acknowledgment within sect. 14. (*Doe v. Beckett*, 4 Q. B. 601; 12 L. J. Q. B. 236.)

Tenancy at will.

When any person shall be in possession, or in receipt

of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or the person through whom he claims, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined. (3 & 4 Will. 4, c. 27, s. 7.) The construction of this section has been the subject of much controversy. It does not, it is presumed, apply to express tenancies at will under which a rent is reserved and paid. (See *Hodgson v. Hooper*, 3 E. & E. 149; 29 L. J., Q. B. 222.) As to all other cases, the short effect of the authorities is this:—A tenancy at will must be taken to have determined for the purposes of the statute at the end of a year from its creation, and from that time the statute begins to run, so that if a landlord create a tenancy at will, and takes no further step, his title is extinguished at the end of thirteen years (3 & 4 Will. 4, c. 27, s. 34), and cannot be revived by a subsequent re-entry. (*Brassington v. Llewellyn*, 27 L. J., Ex. 297.)

The landlord may, however, take steps to arrest the operation of the statute. If he actually turns the tenant out, who thereupon immediately re-enters, this is a resumption of possession on the part of the owner, and time begins to run against him afresh (*Randall v. Stevens*, 2 E. & B. 641); and so where he enters from time to time and asserts ownership. (*Allen v. England*, 3 F. & F. 49.) But if, without proceeding to this extremity, he simply determines the tenancy at any time subsequent to the end of the first year, this has no effect. (*Doe v. Carter*, 9 Q. B. 863; *Day v. Day*, L. R. 3 P. C. 751; 40 L. J., P. C. 35.) But where, upon the determination of the tenancy at will, there is by agreement of the parties, a new tenancy created, this is equivalent to a resumption of possession by the owners and the time begins to run afresh. Whether there has actually been such an agreement is a question of fact. (*Turner v. Doe*, 9 M. & W. 643; *Hodgson v. Hooper*, 3 E. & E. 149.) Where a tenant at will in possession of a house and land was served with a writ of ejectment, but subsequently obtained verbal permission to retain the house and part of the land rent free until his death, it was held that what was done amounted to an actual entry and the

creation of a new tenancy at will, and that time under the statute began to run afresh. (*Locke v. Matthews*, 13 C. B., N. S. 753; 32 L. J., C. P. 98.)

The mere fact that the land is inalienable or only alienable with certain consents which have not been obtained, will not prevent the statute operating. (*Bobbett v. South Eastern Rail. Co.*, 9 Q. B. D. 424; 51 L. J., Q. B. 161; *Mayor of Brighton v. Guardians of Brighton*, 5 C. P. D. 368; 49 L. J., Q. B. 648.)

Acknowledg-
ment in
writing.

The statute may be arrested by an acknowledgment of title in writing signed by the person in possession given to the person entitled or his agent, and in that case the right of entry or to bring an action shall be deemed to have first accrued at and not before the time at which the last of any such acknowledgments was given. (3 & 4 Will. 4, c. 27, s. 14.)

Statutory
title acquired
against
tenant not an
assignment.

The effect of the Statute of Limitations is not to convey the estate of the person out of possession to the person in possession, but to destroy such estate. (*Tichborne v. Weir*, 67 L. T. 735.) And a person who acquires a statutory title, as against the tenant, does not acquire the tenant's term so as to become liable to the landlord as an assignee. (*Ib.*) Thus, where an equitable mortgagee of leaseholds entered into possession as against the tenant, and he and his assignee continued in possession for fifty years without acknowledgment to the tenant, but paying to the landlord the rent reserved by the lease until the end of the term, it was held that the person so in possession did not become liable under the covenant to repair and other covenants running with the land, contained in the lease. (*Ib.*)

CHAPTER X.

ASSIGNMENTS AND UNDERLEASES.

SECT. 1.—*Effect of an Assignment.*

THE original parties to a demise may be changed either by the lessor assigning his estate or reversion, or by the lessee assigning his interest or term, or there may be a change of both parties. Assignments generally,

The assignment may be of the entire reversion or term, or it may be of part only of either, in which event there is what is called a severance of the reversion, or of the term, as the case may be. At common law very different rules prevailed according to whether the assignment was of the whole or of a severed part of either. of the whole or of part.

As the relation between landlord and tenant has ever been considered a legal and not an equitable one (*Cox v. Bishop*, 26 L. J., Ch. 389; 8 De G., M. & G. 815), and as the Courts of equity have recognized and enforced the principles of common law affecting assignments (*Valliant v. Dodemede*, 2 Atk. 546; *Onslow v. Corrie*, 2 Madd. 330; *Staines v. Morris*, 1 Ves. & B. 8), no radical modification of the principles affecting assignments was introduced by the 24th section of the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66); notwithstanding that those principles have to a considerable extent been based upon the common law rule, that mere personal contracts or *choses in action* are not assignable,—a rule which in equity was to a great extent superseded, since an assignment of a contract was regarded as amounting to an agreement to permit the assignee to make use of the name of the assignor in an action upon the contract. One material alteration however results, viz., the introduction of the equitable doctrine of notice, some of the effects of which will be subsequently pointed out.

We propose to deal first with the effect of an assignment, and next with the modes of assignment.

Effect of an assignment.

It is necessary to consider at the outset what covenants or liabilities, express or implied, entered into by the original parties, attach to the relative positions of landlord and tenant as such, so as to pass to the persons who by substitution may from time to time fill those relative positions.

The rights and liabilities affected by an assignment, whether of the whole or of part of the estate of either party, are those relating (1) to rent, (2) to covenants, and (3) to conditions. These we shall consider in detail.

1. *As to rent.*

Rent reserved on a lease is by common law incident to the reversion and passes with it on every devolution or alienation. If the rent consist of money or anything capable of subdivision, and there is a severance of the reversion, the rent is apportionable at common law. (Co. Litt. 148 a.)

The common law, however, only allowed a *legal* reversioner of the whole, or of a severed part, to recover the rent. Under section 10 of the Conveyancing Act, 1881, noticed below (p. 445), the right is extended to the person from time to time entitled to the rent. The section also makes a proper apportionment of the rent binding upon the tenant, though he has not assented to it.

Where there has been a severance of the term, the lessor may sue the assignee of part of the premises for the rent due in respect of that part. (*Gamon v. Vernon*, 2 Lev. 231; *Stevenson v. Lambard*, 2 East, 575.) An assignee of part of the land is not liable in an action of debt for the whole rent. (*Curtis v. Spitty*, 1 Bing. N. C. 756.) Whether he would be liable in an action based on the privity of estate between the parties in respect of the whole land has been mooted and not decided (*ib.*), though it is clear an assignee of part of the premises is liable to a distress for the rent due for the whole. (*Ib.*)

2. *As to covenants.*

The covenants contained in a lease are, for the purposes of this part of our subject, divisible into covenants which run with the land or reversion, and covenants which are collateral, or the mere personal undertaking of the covenantor.

Covenants running with the land, or reversion defined.

A covenant is said to run with the land when either the liability to perform it, or the right to take advantage of it, passes to the assignee of the land. A covenant is said to run with the reversion when either the liability to perform

it, or the right to take advantage of it, passes to the assignee of the reversion. (*Spencer's case*, 1 Smith's L. C. 65, 9th ed.) And such covenants respectively pass to those who come in as well by assignment by operation of law, as by act of the parties.

The doctrine of covenants running with the land applies only where the demise is under seal and the covenant is annexed to the estate by the instrument which creates it. (*Elliott v. Johnson*, 36 L. J., Q. B. 50; L. R., 2 Q. B. 120, *per Lush, J.*)

Only run where demise by deed.

The following rules are established as to covenants running with the land:—

What covenants run with the land.

(a) All implied covenants (*ante*, pp. 98, 128) run with the land.

(b) So do all express covenants, though assigns are not named, which touch or concern something in being at the date of the covenant and parcel of the demise. Accordingly, it has been held that covenants for quiet enjoyment (*Noke v. Awdler*, Cro. Eliz. 436; *Campbell v. Lewis*, 3 B. & Ald. 392), for further assurance (*Middlemore v. Goodale*, Cro. Car. 503; *Kingdon v. Nottle*, 4 M. & S. 53), for renewal (*Roe v. Hayley*, 12 East, 464), or endeavouring to procure renewal (*Simpson v. Clayton*, 4 Bing. N. C. 758), to pay rent (*Parker v. Webb*, 3 Salk. 5; *Williams v. Bosanquet*, 1 B. & B. 238), to render services in the nature of rent (*Vyryan v. Arthur*, 1 B. & C. 410; see 2 Platt, 404; 2 My. & K. 541; 34 L. J., Ch. 84), to allow deductions out of rent (*Baylye v. Offord*, Cro. Car. 137), to repair (*Dean of Windsor's case*, 5 Co. 24 a; *Wakefield v. Brown*, 9 Q. B. 209, 223; 15 L. J., Q. B. 373), to put in repair (*Martyn v. Chue*, 18 Q. B. 661; 22 L. J., Q. B. 147), to leave in repair (*ib.*), to permit the lessor to have free access to rooms excepted from the demise (*Cole's case*, 1 Salk. 196; 12 Mod. 24), to discharge the lessor from charges, ordinary and extraordinary (*Dean of Windsor's case*, *supra*), to cultivate lands in a particular manner (*Cockson v. Cock*, Cro. Jac. 125), or in a husbandlike manner (*Walsh v. Watson*, Esp. N. P. 295), to lime and manure the land and to spend all the muck on it (*Sale v. Kitchingham*, 10 Mod. 158; *Bally v. Wells*, 3 Wils. 32), to use on the land all crops grown there (*per Cotton and Lindley*, LJJ., *Clegg v. Hands*, 44 Ch. D. 512, disapproving the *dictum* in *Lybbe v. Hart* (29 Ch. D. 8, 19) to the contrary), to leave the land properly stocked with game (*Hooper v. Clark*,

"Assigns" not named.

L. R., 2 Q. B. 200; 36 L. J., Q. B. 79), not to assign without licence (*Williams v. Earle*, L. R., 3 Q. B. 739; 37 L. J., Q. B. 231—though in that case assigns were named), to reside on the premises (*Tatem v. Chaplin*, 2 H. Bl. 133; and see note to *Hinde v. Gray*, 1 M. & Gr. 208), not to carry on a particular trade on the premises (*Mayor of Congleton v. Pattison*, 10 East, 136), to use the premises as a private dwelling-house only (*Wilkinson v. Rogers*, 12 W. R. 119), to insure the premises against fire (*Vernon v. Smith*, 5 B. & Ald. 1), to supply water to the premises demised at a certain rate (*Jourdain v. Wilson*, 4 B. & Ald. 266), to produce title deeds (*Barclay v. Raine*, 1 Sim. & S. 449), to pay compensation for injury done to the surface by working the mines thereunder (*Aspden v. Seddon*, 1 Ex. D. 496; 46 L. J., Ex. 353; *Norval v. Pascoe*, 34 L. J., Ch. 82), to conduct the business of an innkeeper upon the premises in such a manner as not to imperil the licence (*Fleetwood v. Hull*, 23 Q. B. D. 35; 58 L. J., Q. B. 341), not to sell on the premises liquors other than those purchased from the lessor (*Clegg v. Hands*, 44 Ch. D. 503; 59 L. J., Ch. 477), and to grind at the lessor's mill all corn grown on the demised premises (*Vyryan v. Arthur*, 1 B. & C. 410, see *ante*, p. 241), have been held to run with the land. It seems also that a covenant to pay at the end of the term for improvements executed upon the premises and for fixtures attached thereto runs with the land. (See *Mansel v. Norton*, 22 Ch. D. 769. *Grey v. Cuthbertson*, 2 Chitt. 482, is not an authority to the contrary, as it appears by the report in 4 Doug. 351, that the breach alleged was neglecting to name an arbitrator.) A covenant to pay for chattels on the land at the end of the term does not run with the land. (*Gorton v. Gregory*, 3 B. & S. 90; 31 L. J., Q. B. 302.)

When
"assigns"
named.

(c) If the covenant is concerning a thing not in being at the time of demise, but which is to be built or done on the demised premises, it will bind the assigns if the covenantor covenant for himself and his assigns. (*Spencer's Case*, *supra*; *Easterby v. Sampson*, 6 Bing. 644, 652; *Doughty v. Bowman*, 11 Q. B. 444; 17 L. J., Q. B. 111; *Re Fawcett and Holmes*, 42 Ch. D. 150; 61 L. T. 105; but see *Minshull v. Oakes*, 2 H. & N. 793; 27 L. J., Ex. 194.) It is necessary that it should affect the land, do benefit to the land, or affect the rent issuing out of the land. (*Haywood v. Brunswick Building Society*, 8 Q. B. D. 403;

51 L. J., Q. B. 73.) Such is a covenant to build a wall, a dwelling-house, or a mill; or a covenant to convey coals along a railway, to be constructed on the demised land (*Hemingway v. Fernandes*, 13 Sim. 228); or a covenant not to assign without licence. (*Williams v. Earle*, L. R., 3 Q. B. 739; 37 L. J., Q. B. 231; *West v. Dobb*, L. R., 4 Q. B. 634; 38 L. J., Q. B. 289.) And the latter covenant would appear to bind the assigns, whether named or not.

(d) If the thing to be done be merely collateral to the land, and does not touch or concern the thing demised in any sort, then the covenant will not extend to the assigns though named; as if the lessee covenant for himself and his assigns to build upon land *which is no parcel of the demise*, or to pay any collateral sum to the lessor or to a stranger. (*Spencer's Case*, *supra*.) Hence the following covenants have been held not to run with the land:—a covenant by the lessor to give the lessee a right of pre-emption in respect of an adjoining piece of ground (*Collison v. Lettsom*, 6 Taunt. 224); a covenant in a lease of a public house not to build or keep any house for the sale of spirits or beer within a certain distance thereof (*Thomas v. Hayward*, L. R., 4 Ex. 311; 38 L. J., Ex. 175); a covenant by a lessor in an underlease to perform the covenants in the head lease, or in default to indemnify the underlessee (*Doughty v. Bowman*, 11 Q. B. 444; 17 L. J., Q. B. 111); a covenant to pay taxes chargeable upon the lessor in respect of premises other than those demised (*Gower v. Postmaster-General*, 57 L. T. 527); an independent agreement after the execution of the lease to pay a percentage on the outlay on the premises by way of additional rent (*Lambert v. Norris*, 2 M. & W. 333); and a covenant in a lease of a mill not to hire persons to work in the mill who were settled in other parishes. (*Mayor of Congleton v. Pattison*, 10 East, 130.)

Assigns though named not bound by collateral covenants.

Covenants respecting incorporeal hereditaments, as in the case of a right of shooting, or a right to get minerals, stand upon the same footing as covenants respecting corporeal hereditaments. (*Hooper v. Clark*, L. R., 2 Q. B. 200; 36 L. J., Q. B. 79; *Martyn v. Williams*, 1 H. & N. 817; *Norval v. Pascoe*, 34 L. J., Ch. 82.) So do covenants as to fixtures, but not covenants as to chattels, which are not fixtures. (*Williams v. Earle*, *supra*.) Therefore, when live-stock or other chattels form part of the demise a covenant by the lessee for himself and his assigns to

Covenants as to incorporeal hereditaments and fixtures.

Covenants
running with
the land now
run with the
reversion.

deliver them up at the end of the term will not bind the assigns. (*Spencer's Case*, 1 Sm. L. C. 65, 9th ed.)

At common law covenants ran with the land, but not with the reversion. (*Thursby v. Plant*, 1 Wms. Saund. 240, n. (o); *Stevens v. Copp*, 38 L. J., Ex. 31; L. R., 4 Ex. 20.) This was remedied by 32 Hen. 8, c. 34, which enacted by sect. 1, that all grantees or assignees of the reversion should have the like advantages by entry for non-payment of rent or forfeiture, and the same remedies by action for not performing conditions or covenants against lessees and their assigns as the lessors had; and by sect. 2 that lessees should have the like remedy against grantees of the reversion as they might have had against the lessors. The assignees of landlord and tenant were thus placed on the same footing.

The statute only applies to covenants which run with the land, and not to collateral covenants. (*Spencer's case*, 1 Sm. L. C. 65, 9th ed.; *Thursby v. Plant*, *supra*.) Moreover, it only applies to leases under seal. (*Brydges v. Lewis*, 3 Q. B. 603; 11 L. J., Q. B. 268; *Standen v. Christmas*, 10 Q. B. 135; 16 L. J., Q. B. 265.) And as at common law a parol contract did not run with the land (*Elliott v. Johnson*, 36 L. J., Q. B. 50), the assignees of landlord and tenant in the case of a parol tenancy are also on the same footing, and in the case of an assignment of either reversion or term any remedy upon the stipulations contained in the parol demise (so long as the old tenancy remains and until a new tenancy is created in the manner hereinafter noticed) must be by action in the name of the original stipulator. (*Bickford v. Parson*, 5 C. B. 920; 17 L. J., C. P. 192.) But after an assignment the assignee may sue in respect of any right arising out of the privity of estate. (See *Allcock v. Moorhouse*, 9 Q. B. D. 366; 47 L. T. 404.)

Assignments
in case of
leases not
under seal.

Although the statute 32 Hen. 8, c. 34, does not apply to lettings not under seal, yet if on the death of the landlord (*Cornish v. Stubbs*, L. R., 5 C. P. 334; 39 L. J., C. P. 202) or other assignment of the reversion (*Wyatt v. Cole*, 36 L. T. 613), a tenant not holding by a demise under seal continues to pay rent to the person in whom the reversion has vested, such payment and acceptance of rent will be deemed evidence that the latter has assented to the tenant continuing on all the terms of the original letting. (*Phillips v. Miller*, L. R., 10 C. P. 420; 44 L. J.,

C. P. 265.) Again, if such a tenant die or assign his interest, and the executors or assignee continue to pay rent, this raises an implied contract that the landlord accepts the new tenant on the terms of the original letting. (*Buckworth v. Simpson*, 1 Cr. & M. 834; 4 L. J., Ex. 104.) But there must be payment and acceptance of rent or other unequivocal act to show a recognition by the landlord of a new tenancy on the terms of the old one (*Elliott v. Johnson*, L. R., 2 Q. B. 120; 36 L. J., Q. B. 44); and the question whether or not the landlord has recognized and adopted such a tenancy is one of fact for the jury. (*Smith v. Eggington*, L. R., 9 C. P. 145; 43 L. J., C. P. 140.)

Covenants are divisible, and upon a severance of the land or the reversion, the covenants run with the severed parts. (*Ticynam v. Pickard*, 2 B. & Ald. 105; *Wollaston v. Hakevill*, 3 M. & Gr. 322; *Mayor of Swansea v. Thomas*, 52 L. J., Q. B. 340; 10 Q. B. D. 48.) If a reversioner, instead of parting with his whole interest, assigns part of it, that is, carves out of it a reversionary interest less than his own, the covenants run with the latter reversion, and are apportionable as in other cases. (*Attoe v. Hemmings*, 2 Bulst. 281.) So in the case of an assignment of a part, say a third, of the interest in the whole term or the whole reversion, the benefit and burden of the covenants run with the severed parts. (*Nortal v. Pascoe*, 34 L. J., Ch. 82; *Merceron v. Doucson*, 5 B. & C. 479; *Roberts v. Holland*, W. N. (1893), 74.)

Covenants upon severance run with the severed parts.

The following provisions are contained in the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), but are applicable only to leases made after the commencement of the Act (31st December, 1881):—

Conveyancing Act, 1881.

Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the

Rent and benefit of lessee's covenants to run with reversion.

Obligation
of lessor's
covenants to
run with
reversion.

term, to the income of the whole or any part, as the case may require, of the land leased. (Sect. 10.)

The obligation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled. (Sect. 11.)

It will be observed that each of the above sections deals only with "leases": and while sect. 10 speaks of "covenant or provision," sect. 11 speaks only of "covenant." It remains to be decided whether the sections like those of the statute 32 Hen. 8, c. 34, are restricted to leases under seal, or include parol leases, or even extend to agreements for leases under which the tenants are in the same position as if a lease had been granted. (*Ante*, p. 75.) Until the contrary is decided, it is submitted that the sections apply only to leases under seal, and are restricted to altering the law in manner hereafter mentioned, when the lease is created by a person who is not the legal reversioner.

It is also to be observed that the sections only deal with the rights and obligations of the reversion, and do not deal with the rights and obligations attached to the term, and the severed parts thereof, under covenants entered into with or by the lessee, which are left to be dealt with by the rules we have previously noticed.

Effect of the
Act.

The following effects flow from these sections:—(1) The rent and the benefit of the covenants in a lease are annexed to and run with the legal reversion both in the case of a lease created by a limited owner, under the ordinary power in a will or settlement (*Greenaway v. Hart*, 23 L. J., C. P. 115; 14 C. B. 340), or under a statutory power, and also in the case of a lease created by a mortgagor under the powers of sect. 18 of the Act. (*Municipal, &c. Building Society v. Smith*, 22 Q. B. D. 70.) (2) The beneficial

owner or "person entitled to the income" has the right as well as the legal reversioner to enforce payment of the rent and observance of the covenants. (3) Where a valid lease has been granted under a power, the legal reversioner will be liable under the covenants contained in the lease.

The benefit and burden of covenants which do not run with the land or the reversion may nevertheless pass by reason of notice to the party to be affected. This applies only to negative restrictive covenants, and not to an affirmative covenant (*Haywood v. Brunswick Building Society*, 8 Q. B. D. 403; 51 L. J., Q. B. 73; *London & South Western Rail. Co. v. Gomm*, 20 Ch. D. 562; 51 L. J., Ch. 530; *Austerberry v. Corporation of Oldham*, 29 Ch. D. 750; 55 L. J., Ch. 633), unless the affirmative covenant is one with a negative element in it. (*Clegg v. Hands*, 44 Ch. D. 503; 59 L. J., Ch. 477.) The rule has been defined as either an extension in equity of the doctrine of *Spencer's case*, or else an extension in equity of the doctrine of negative easements. (*London and South Western Rail. Co. v. Gomm*, *supra*.)

Restrictive covenants binding by reason of notice.

The rule is (see *per Cotton*, L. J., *Hall v. Ewin*, 37 Ch. D. 74), that if a man buys (*Tulk v. Moxhay*, 2 Phil. 774; *Western v. McDermott*, 36 L. J., Ch. 76; *Morland v. Cook*, 37 L. J., Ch. 825; L. R., 6 Eq. 252; *Catt v. Tourle*, 38 L. J., Ch. 665; L. R., 4 Ch. 654), or takes a lease (*Wilson v. Hart*, 35 L. J., Ch. 569; L. R., 1 Ch. 463; *Richards v. Revett*, 47 L. J., Ch. 472; 7 Ch. D. 224), or an assignment of a lease (*Luker v. Dennis*, 47 L. J., Ch. 174; 7 Ch. D. 227), or an underlease (*Parker v. Whyte*, 1 H. & M. 167; 11 W. R. 683; 32 L. J., Ch. 520; *Tritton v. Bankart*, 56 L. T. 306), or merely enters into occupation of the premises (*Mander v. Falcke*, [1891] 2 Ch. 554) with notice of any negative restrictive covenant, not binding upon him at law, entered into by the person under whom he takes title, he will be bound to observe it.

Upon person in possession under covenant with actual or constructive notice of covenant.

It is immaterial that the lessee accepted his lease without actual notice of the covenants, since a tenant has, in law, constructive notice of the title of his lessor. (*Patman v. Harland*, 17 Ch. D. 353; 50 L. J., Ch. 642; *Thornevell v. Johnson*, 50 L. J., Ch. 641; *Fielden v. Slater*, 38 L. J., Ch. 379; L. R., 7 Eq. 523; *London, Chatham and Dover Rail. Co. v. Bull*, 47 L. T. 413; *Tritton v. Bankart*, 56 L. T. 306; 56 L. J., Ch. 629; 35 W. R. 474; 45 & 46 Vict. c. 39, s. 3.) It has even been held that an underlessee and his assigns are bound by covenants, of

which he has no actual notice, contained in any assignment of the original lease, although the covenantee has no reversion in the land. (*Clements v. Welles*, 35 L. J., Ch. 265; L. R., 1 Eq. 200.) But a tenant was held not to have constructive notice of a covenant contained in a separate deed, no portion of the title to the premises. (*Carter v. Williams*, 39 L. J., Ch. 560; L. R., 9 Eq. 678.)

An underlessee who by reason of want of privity of estate is not liable at law on a covenant contained in the original lease, and who is not in fact in possession of the premises, cannot, however, be restrained by injunction for a breach of covenant by his underlessee, or compelled to take proceedings against each underlessee. (*Hall v. Ewin*, 37 Ch. D. 74; 57 L. J., Ch. 95.)

As between the assignor and assignee of an underlease, the latter is held to have constructive notice of the terms of the original lease only when he has had a fair opportunity of ascertaining the terms. (*Hyde v. Warden*, 47 L. J., Ex. 121; 3 Ex. D. 72.) As to who may enforce restrictive covenants, see Chap. V. (*ante*, p. 237).

3. *As to conditions.*

Run with the land.

A covenant and a condition stand upon the same footing as regards running with the land (*Stevens v. Copp*, L. R., 4 Ex. 20; 38 L. J., Ex. 31), and although a condition for re-entry in case the lessee or his assigns became bankrupt was held to run with the land (*Roe v. Galliers*, 2 T. R. 133), yet a condition for re-entry in case the lessee or his assigns should be convicted of an offence under the Game Act was held to be merely a collateral condition, and not one touching the thing demised. (*Stevens v. Copp*, *supra*.)

Until recently conditions stood on a different footing to covenants as regards apportionment on a severance of the reversion.

Conditions apportioned on severance of the reversion.

At common law a *condition* could not be apportioned; and if the reversion were severed, neither of the reversioners could take advantage of the condition. However, by 22 & 23 Vict. c. 35, s. 3, in such a case, if the rent is legally apportioned, the assignee of each part of the reversion has, in respect of his apportioned rent, &c., the benefit of all conditions or powers of re-entry for non-payment incident to the original entire rent.

This statute only applied to rights of re-entry for non-payment of rent, so that a right of re-entry for breach of covenant could not be enforced by the grantee of the reversion of part of the premises. (But see *Hyde v.*

Warden, 3 Ex. D. 72.) As to leases made after the 31st December, 1881, this is remedied by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 12, which enacts that, “notwithstanding the severance by conveyance, surrender, or otherwise, of the reversionary estate in any land comprised in a lease, and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein, every condition or right of re-entry, and every other condition contained in the lease, shall be apportioned, and shall remain annexed to the severed parts of the reversionary estate as severed, and shall be in force with respect to the term whereon each severed part is reversionary, or the term in any land which has not been surrendered, or as to which the term has not been avoided or has not otherwise ceased, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease.”

Apportionment of conditions on severance.

44 & 45 Vict. c. 41, s. 12.

SECT. 2.—*Modes of Assignment.*

An assignment, whether of the reversion or of the term, may be either by act of the parties or by operation of law. The effect upon the position of the parties *inter se* is the same, however effected.

Modes of assignment.

An interest acquired under the Statute of Limitations is not an assignment, and a person who acquired a statutory title against the tenant and continued to pay the rent reserved by the lease until the end of the term, was held not to be liable under the covenants running with the land. (*Tichborne v. Weir*, 67 L. T. 735.)

(a) *Act of the Parties.*

An assignment by act of the parties, whether of the reversion or of the term, must be by deed. In the case of a freehold reversion this is a requirement of common law; in the case of a leasehold reversion and of a term it is a statutory requirement, the result of the united operation of section 3 of the Statute of Frauds and of 8 & 9 Vict.

Assignment by act of the parties.

c. 106, s. 3, providing that "an assignment of a chattel interest shall be void at law unless by deed."

Stamp on.

An assignment upon a sale must be stamped as a conveyance; an assignment by way of security, as a mortgage.

Assignment of the reversion.

A lessor may grant or assign his reversion *by deed*, either absolutely or by way of mortgage. Formerly, upon an assignment of a reversion, it was necessary the tenant should attorn or assent to his new landlord. This formality is dispensed with by 4 Anne, c. 16, s. 9. The operation of this statute is to complete the title of the assignee of the reversion, so that without attornment by, or notice to, the tenant, the assignee may re-enter for condition broken. (*Scaltock v. Harston*, 1 C. P. D. 106; 45 L. J., C. P. 125.) Section 10 of the same statute, however, provides that the tenant shall not be prejudiced by payment of rent as before, until the grantee give him notice of the grant or assignment. If the grantee, whether absolute or by way of mortgage, give notice before the day for payment of rent, this section does not relieve the tenant from liability for any rent he may have paid in advance to his former landlord. (*De Nicholls v. Saunders*, L. R., 5 C. P. 589; *Cook v. Guerra*, L. R., 7 C. P. 132; *Municipal Permanent, &c. Building Society v. Smith*, 22 Q. B. D. 70; and see *Moss v. Gallimore*, 1 Smith, L. C. 604, 9th ed.)

Assignee bound by tenant's equities.

Upon the purchase of the reversion, notice of a tenancy is notice of all the terms upon which the tenant holds, and the purchaser takes subject to all the tenant's equities. (*Allen v. Anthony*, 1 Mer. 282; *Daniels v. Darison*, 16 Ves. 254; *Carroll v. Keays*, 22 W. R. 243; *Carander v. Bulteel*, L. R., 9 Ch. 79; 43 L. J., Ch. 370.) The tenant cannot legally be in possession without having some rights, and his possession is held to give notice to a purchaser as to what those rights are. (*Allen v. Seckham*, 28 W. R. 26.) This rule only applies, however, as between the purchaser and the tenant when the purchase has been completed, and has nothing to do with the rights and liabilities of the vendor and purchaser as between themselves. (*Caballero v. Henty*, 43 L. J., Ch. 635; *Phillips v. Miller*, 44 L. J., C. P. 265; L. R., 10 C. P. 420.)

Effect of assignment upon remedies against tenant.

The assignee of the reversion has no right of action in respect of arrears of rent which became due before the assignment (*Flight v. Bentley*, 7 Sim. 149; *Sharp v. Key*, 8 M. & W. 379), or for breaches of covenants, although

running with the land, committed before the assignment. (*Martyn v. Williams*, 1 H. & N. 817; 26 L. J., Ex. 117; *Johnson v. St. Peter, Hereford*, 4 A. & E. 520.)

All tenants other than tenants at sufferance have, unless Assignment of term restrained by some provision in their leases, the right to dispose of their whole estate by way of assignment, or to carve out of it some less estate by way of underlease. If a man dispose of the whole of his term by deed, it is an assignment, though in form an underlease (*Beardman v. Wilson*, 38 L. J., C. P. 91; L. R., 4 C. P. 57; Platt, Leases, 10; but see *Hyde v. Warden*, 47 L. J., Ex. 121; 3 Ex. D. 72), even where he reserves rent to himself, and the deed contains covenants not in the original lease. (*Palmer v. Edwards*, 1 Doug. 187, n.) And so if he purport to grant an underlease for a longer term than he himself possesses. (*Williams v. Hayward*, 28 L. J., Q. B. 374; 1 E. & E. 1040; *Baker v. Gostling*, 1 Bing. N. C. 19; *Wollaston v. Hakevill*, 10 L. J., C. P. 303; 3 M. & Gr. 297; *Hicks v. Downing*, 1 Ld. Raym. 99.) If the deed passes a less estate than he has, it is an underlease, though in form an assignment. (See *Derby v. Taylor*, 1 East, 502.) The difference is important. If a lessee dispose of his whole term, reserving rent, he may sue for but not distrain for it. (*Preece v. Corrie*, 5 Bing. 24; *Parmenter v. Webber*, 8 Taunt. 593.) If he dispose of less than his whole interest he may do either.

All assignments of terms must be by deed, though the leases themselves may be by parol. must be by deed, (29 Car. 2, c. 3, s. 3; 8 & 9 Vict. c. 106, s. 3; *Botting v. Martin*, 1 Camp. 317.) An assignment must not only be of the whole interest of and pass the legal estate. the assignor, but it must put the assignee in possession of the legal estate, and not give him a mere equitable title. (*Cox v. Bishop*, 8 De G., M. & G. 815; 26 L. J., Ch. 389.) Thus, a person in possession under an agreement for an assignment (*ib.*), or the deposittee of a lease by way of equitable mortgage, is not liable under the covenants in a lease (*Moore v. Choat*, 8 Sim. 508; Fisher on Mortgages, 16); neither is a person in possession under an arrangement with the lessee who consents to hold the term as trustee. (*Walters v. Northern Coal Mining Co.*, 25 L. J., Ch. 633; but see *Wright v. Pitt*, 40 L. J., Ch. 558.) And even if an equitable assignee go into possession and pay rent for some time, the lessor has no equity to compel him to take a legal assignment so as to become liable on the covenants

and for the rent. (*Moore v. Greg*, 18 L. J., Ch. 15; 2 De G. & Sm. 304; 2 Ph. 717.)

What will
pass a term.

An assignment of "personal estate" will pass leaseholds (*White v. Hunt*, L. R., 6 Ex. 32; *Debenham v. Digby*, 21 W. R. 359), particularly where the object of the deed is to make a general assignment of property for the benefit of creditors or otherwise. (*Ringer v. Cann*, 3 M. & W. 343.) But where the words "all other the personal estate," occur at the end of a specific enumeration of chattels personal, it will be restricted to things *ejusdem generis*. (*Harrison v. Blackburn*, 34 L. J., C. P. 109; 17 C. B., N. S. 678.)

Covenants by
the assignee.

On an assignment either by the original lessee or his personal representative, or by an assignee who has entered into a similar covenant, the assignor is entitled to require the assignee to enter into covenants to pay the rent and perform the covenants contained in the lease and to indemnify the assignor against the same (*Pember v. Mathers*, 1 Bro. C. C. 52; *Staines v. Morris*, 1 Ves. & B. 8; *Cochrane v. Robinson*, 11 Sim. 378); and the like covenants must be entered into by a railway company taking property under its compulsory powers. (*Harding v. Metropolitan Rail. Co.*, 41 L. J., Ch. 371; L. R., 7 Ch. 154.) And so on a sale of leaseholds in lots effected by way of underlease, each purchaser must covenant to perform the covenants contained in the original lease so far as the same relate to the property comprised in his own underlease. (*Broune v. Paull*, 2 Jur., N. S. 317.)

But where no continuing liability under the covenants of the lease exists in or affects the assignor after assignment over, no covenant for indemnity can be required from the assignee. Thus, on an assignment by a trustee in bankruptcy, the assignee cannot be required to enter into a covenant to indemnify the trustee or the bankrupt, since the liability of both ceases on assignment. (*Wilkins v. Fry*, 1 Mer. 265; but see *Ex parte Buxton, Re Muller*, 15 Ch. D. 289; 29 W. R. 28.)

Liability after
assignment, of
assignee to
original
lessee.

There is an implied promise, on the part of each successive assignee of a lease, to indemnify the original lessee against breaches of the covenants in the lease by such assignee during the continuance of his own estate and before he assigns over; and such promise will be implied although each assignee has covenanted to indemnify his immediate assignor against all subsequent breaches. (*Moule*

v. Garrett, L. R., 5 Ex. 132; 41 L. J., Ex. 62; *Wolveridge v. Steuard*, 1 Cr. & M. 644; *Burnett v. Lynch*, 5 B. & C. 589.)

The covenant for indemnity by an assignee is capable of proof in bankruptcy, and a claim thereunder against a bankrupt is barred by his order of discharge. (*Hardy v. Fothergill*, 13 App. Cas. 351; 58 L. J., Q. B. 44.)

Under the covenant for indemnity the lessee or assignor is entitled for breach thereof to recover such damages as he actually sustains (see *Burnett v. Lynch*, *supra*), including the costs of an action (*Smith v. Howell*, 6 Ex. 730; 20 L. J., Ex. 377), even though defended, if such defence was reasonable. (*Murrell v. Flysh*, Cab. & E. 80.)

An assignment does not discharge the lessee from liability. If by acceptance of rent or in other ways the landlord recognize the assignee as his tenant, that will discharge the lessee from all merely *implied* covenants, but not from his express covenants. (*Auriol v. Mills*, 4 T. R. 98; *Thursby v. Plant*, 1 Wms. Saund. 240.) And a lessee who has assigned his term, and whose assignee has been accepted by the landlord, may yet be sued on his express covenants, either by the lessor or the assignee of the lessor (*Barnard v. Godscall*, Cro. Jac. 309; *Brett v. Cumberland*, *ib.* 521); and so may his personal representatives having assets. (*Hellier v. Casbard*, 1 Sid. 266; *Coghil v. Freelove*, 3 Mod. 325.)

Of the lessee
to the lessor.

In *Walker's case* (3 Rep. 22 a), it was said that if the lessee assign over his term the lessor may charge either lessee or assignee at his election, and, therefore, if the lessor accept rent of the assignee he has determined his election and shall not afterwards have an action against the lessee for rent due after the assignment. Later cases, however, restricted this to the liability arising from privity of estate and the simple reservation of a rent, and decided that where there was an express covenant the obligation thereunder continued (*Auriol v. Mills*, *supra*; *Stevenson v. Lambard*, 2 East, 575; *Baynton v. Morgan*, 22 Q. B. D. 74; 58 L. J., Q. B. 139), though in the recent case of *Mayor of Swansea v. Thomas* (10 Q. B. D. 48; 47 L. T. 657), Pollock, B., treated *Walker's case* as an authority for the contention that the obligation even under a covenant would be extinguished.

If a tenant from year to year by parol, assign his interest, he remains liable under his contract, though he

has parted with his estate, until the landlord recognizes the assignee. (*Shine v. Dillon*, 15 W. R. 847.) But if after an assignment of a parol yearly tenancy the landlord, without acknowledging the assignment, grants away his reversion, the grantee of the reversion cannot recover from the original tenant rent becoming due after the assignment. (*Allcock v. Moorhouse*, 47 L. T. 404; 9 Q. B. D. 366.)

Liability after assignment of the assignee to the lessor.

The assignee is liable for breach of any covenant running with the land. His liability commences from the assignment and continues until he re-assigns to some one else, and no longer. (*Onslow v. Corrie*, 2 Madd. 340.) Thus, no action will lie against him for a breach of covenant happening before the assignment. (*Churchwardens of St. Saviour v. Smith*, 1 W. Bl. 351.) But in the case of an assignment by act of the parties, it is now well established, notwithstanding some old authorities to the contrary, that, whether the assignment be absolute or by way of mortgage, the liability of the assignee is complete on the assignment without actual entry (*Walker v. Reeve*, 3 Doug. 19; *Williams v. Bosanquet*, 1 B. & B. 238; *Burton v. Barclay*, 7 Bing. 761; *Stone v. Evans*, Peake Ad. Ca. 94); and therefore an action will lie for breaches of covenant after the assignment, but before the assignee has taken possession; *e. g.*, a mortgagee by assignment of the term, though not in possession, is liable to perform the covenants in the lease, not on the score of possession but as assignee. (*Williams v. Bosanquet*, 1 B. & B. 238.) The rule is different in the case of an executor who is not liable on the covenants in the lease until he has entered. (*Infra*, p. 457.) On the other hand, an assignee is discharged from all future liability by a re-assignment, even though the assignment be merely for the purpose of getting rid of the liability and be to an insolvent person, and though the person to whom the assignment is made never enters into possession or accepts the lease (*Taylor v. Shum*, 1 B. & P. 21; *Paul v. Nurse*, 8 B. & C. 486; *Valliant v. Dodemede*, 2 Atk. 546; *Onslow v. Corrie*, 2 Madd. 330; *Hopkinson v. Lovering*, 11 Q. B. D. 92; 52 L. J., Q. B. 391), unless the assignment be merely colourable and fictitious. (*Philpot v. Hoare*, Amb. 480; *Onslow v. Corrie*, 2 Madd. 341.) If part only of the estate be re-assigned, the assignee will still remain liable in respect of the part retained by him. (*Congham v. King*, Cro. Car. 221.) The assignee of the lease will have a right of action against

the lessor or his assigns for breach of any covenant running with the land.

Inasmuch as an assignee of leaseholds becomes liable to pay rent and perform the covenants in the lease, an assignment of leaseholds cannot be treated as voluntary and set aside under 27 Eliz. c. 4 (*Price v. Jenkins*, 5 Ch. D. 619; 46 L. J., Ch. 805; *Ex parte Doble, Re Doble*, 26 W. R. 407; *Horrocks v. Rigby*, 26 W. R. 714; *Brinton v. Lulham*, 53 L. J., Ch. 928; 51 L. T. 564; *Harris v. Tubb*, 60 L. T. 699; 38 W. R. 75), though a settlement by way of sub-demise might be set aside as being without consideration. (*Shurmur v. Sedgwick*, 24 Ch. D. 597; 53 L. J., Ch. 87.) And the obligation to pay rent which attaches to an assignee is not a "good consideration" to support a settlement which is impeached as made with intent to defeat or delay creditors under 13 Eliz. c. 5 (*Ridler v. Ridler*, 22 Ch. D. 74; 52 L. J., Ch. 343; *Green v. Paterson*, 32 Ch. D. 95; 56 L. J., Ch. 181); nor a "valuable consideration" to support a settlement impeached as voluntary under the Bankruptcy Act (*Ex parte Hillman, Re Pumfrey*, 10 Ch. D. 622; 48 L. J., Bkcy. 77); nor is it in any case a consideration to support a concurrent conveyance of freeholds. (*Re Marsh and Granville*, 24 Ch. D. 11; 53 L. J., Ch. 81.)

Assignments of leaseholds not affected by 27 Eliz. c. 4.

(b) Operation of Law.

An assignment involuntary or by operation of law takes place upon the death or bankruptcy of the lessee, or upon the lease being taken and sold under an execution.

Assignments by operation of law.

Upon the death of a person, all his terms of years, which include tenancies from year to year (*Doe v. Wood*, 14 M. & W. 682; *James v. Dean*, 11 Ves. 393; *Mackay v. Mackreth*, 4 Doug. 213), and chattels real, vest in his executor or administrator. (*Ackland v. Pring*, 2 M. & Gr. 937; 10 L. J., C. P. 231.) And they so vest notwithstanding they may be specifically bequeathed; nor is the legatee entitled to enter until the bequest is assented to by the executor or administrator. (1 Wms. Exors. 679, 7th ed.) And the assent is necessary notwithstanding the executor and legatee are the same person. (*Hawkins v. Williams*, 10 W. R. 692.) Under 24 & 25 Vict. c. 114, s. 2, English leaseholds will pass under the will of an Englishman resident in Scotland, executed in Scotch form, and not valid

BY DEATH.

according to English law. (*Carlton v. Carlton*, 35 W. R. 711.) In the case of a domiciled Scotchman dying intestate as to English leaseholds, they will belong to his next of kin according to the English Statute of Distributions. (*Duncan v. Lawson*, 60 L. T. 732.)

Time when
terms vest in
personal re-
presentatives.

There is an important distinction as to the time when a term of years vests in an executor, and in an administrator. An executor derives his title from the will itself, not from the probate, which is merely evidence of the will, and the property vests in him from the moment of the testator's death. (*Woolley v. Clark*, 5 B. & Ald. 744; 1 Wms. Exors. 293, 7th ed.) He may do almost all the acts incident to his office before probate. Thus, he may assent to a bequest of the term, or assign or surrender the term, and such acts are effectual though he die without proving the will, if the will be in fact subsequently proved by somebody. (*Johnson v. Warwick*, 25 L. J., C. P. 102; 1 Wms. Exors. 303, 7th ed.) If, however, acts done before probate are relied on for title or are sought to be enforced, the will must be authenticated by subsequent probate. (*Ib.* 304, 7th ed.) With an administrator it is different. He derives his title from the appointment of the Court. He has no title until letters of administration are granted to him, and the property only vests in him from that time. (*Woolley v. Clark*, *supra*; 1 Wms. Exors. 404, 7th ed.) So that an assignment or surrender of a lease, or an assent to any disposition thereof by the administrator before letters is of no validity, notwithstanding he may have acted as executor *de son tort*. (*Doe v. Glenn*, 1 A. & E. 49; *Morgan v. Thomas*, 22 L. J., Ex. 152; 3 Preston, Abst. 146.) For the purposes of the Statute of Limitations, however, the administrator shall be deemed to claim as if there had been no interval between the death and the letters of administration. (3 & 4 Will. 4, c. 27, s. 6; *Davies v. Williams*, 34 Ch. D. 558; 56 L. J., Ch. 123.)

One of several executors or administrators can make an effectual disposition of chattels of the testator or intestate (*Hawkins v. Williams*, 10 W. R. 692); and it is no objection to a title that an assignment of a term was executed by one executor only, though the deed was prepared as an assignment by two executors. (*Simpson v. Gutteridge*, 1 Madd. 609.) And one executor may assent to a bequest to himself. (*Townson v. Tickell*, 3 B. & Ald. 40.)

An executor, generally speaking, cannot waive a term of years, though it is worthless, for he must renounce the executorship *in toto* or not at all; yet, if the value of the land is of less amount than the rent, and there is a deficiency of assets, he may waive the lease. If there are assets, he must pay the rent as long as the assets hold out, and then waive. (Wms. Exors. 680, 1757.) For rent due and breaches of covenant committed in the lifetime of the tenant, the executor or administrator is liable in his representative capacity, but only so far as he has assets (2 Wms. Exors. 1753; 1 Bullen & L. Pl. 252, 4th ed.); for rent accruing due and breaches committed after the death of the tenant, the executor or administrator may be sued either in his representative capacity or personally as assignee of the term (*ib.*); and it seems that with respect to breaches of covenant after the death of the testator, the executor is liable *de bonis propriis* as assignee of the term. (*Tilney v. Norris*, 1 Ld. Raym. 553; *Sleap v. Newman*, 12 C. B., N. S. 116.)

Liability of
executor or
administrator.

The proposition lastly stated is to be taken with the following qualifications. In the first place an executor or administrator is only chargeable personally as an assignee when he has actually entered or done acts equivalent to an entry. (*Rendall v. Andreae*, 61 L. J., Q. B. 630; *Buckley v. Pirk*, 1 Salk. 316; *Wollaston v. Hakerill*, 3 M. & Gr. 297; 10 L. J., C. P. 303; *Kearsley v. Oxley*, 2 H. & C. 896; *Green v. Earl of Listowell*, 2 Ir. L. R. 384.) For the law is more merciful than consistent in the case of a personal representative. To take advantage of the rule, however, the defendant should plead specially that he took as executor or administrator and has never entered. (*Ib.*)

Measure of
personal
liability of
executor or
administrator.

In the second place the measure of the liability of an executor or administrator varies according to whether he is sued in respect of rent or of breach of covenant. (*Rendall v. Andreae*, *supra*.)

As to rent, the rule is that an executor or administrator is chargeable with the amount which he has made, or with due diligence might have made, out of the property, that is, the rental value of the property. (*Rubery v. Sterens*, 4 B. & Ad. 241; *Hornidge v. Wilson*, 11 A. & E. 645; *Hopwood v. Whaley*, 6 C. B. 744; 18 L. J., C. P. 43.) It is immaterial that the executors have received no rent or only part of the rent, if with due diligence they might have received more (*Re Bowes*, *Strathmore v. Vane*, 37

As to rent.

Ch. D. 128; 57 L. J., Ch. 455); as, for example, if the premises might have been let for a higher rent but for the executor's default in complying with his obligation to repair. (*Hornidge v. Wilson*, *supra*.)

As to covenants.

There is no corresponding limitation of the executor's or administrator's liability in the case of covenants, and he is personally liable to the full extent for the loss or damage resulting from any breach of which he has been guilty (*Tilney v. Norris*, 1 Ld. Raym. 553; *Tremere v. Morison*, 1 Bing. N. C. 89; *Sleap v. Newman*, 12 C. B., N. S. 116), notwithstanding the premises have yielded no profit.

An executor *de son tort* is personally liable on the covenants in a lease. (*Williams v. Heales*, 43 L. J., C. P. 80; L. R., 9 C. P. 177; *Paull v. Simpson*, 9 Q. B. 365.)

How executor discharged from liability.

An executor or administrator of an assignee of a term may discharge himself from all *personal* liability by an assignment of the term. (*Rouley v. Adams*, 4 My. & Cr. 534.) Where, however, the testator or intestate was the original lessee, his executor or administrator, so long as he has assets, would, apart from the protection hereafter mentioned, remain liable on the express covenants contained, not only in the leases which he himself may have assigned over (*Coghil v. Freelove*, 3 Mod. 325; *Pitcher v. Torey*, 4 Mod. 76), but also on leases assigned by the testator during his lifetime, even though the lessor may have accepted the assignees as his tenants. (*Brett v. Cumberland*, Cro. Jac. 521; *Thursby v. Plant*, 1 Saund. 241.) But *plene administravit* is a good defence to such a claim. (*Wilson v. Wigg*, 10 East, 313.) Moreover, an executor or administrator has now an ample means of protecting himself furnished by 22 & 23 Vict. c. 35, s. 27, which provides that where an executor or administrator, after satisfying all liabilities accrued due and claimed under a lease or agreement for a lease granted or assigned to the testator or intestate, and setting apart a sufficient sum to answer any future claim in respect of any fixed and ascertained sum under the lease, has assigned the lease to a *purchaser*, and distributed the residuary estate, he shall no longer be personally liable in respect of any subsequent claim under the lease; but the lessor may follow the assets distributed. (See *Dodson v. Sammell*, 30 L. J., Ch. 799; *Crook v. Hendry*, 26 W. R. 325.) The section is retrospective. (*Smith v. Smith*, 1 Dr. & Sm. 384; 9 W. R. 406.) But its protection only applies when the executors

have sold, not when they have been assigned to a residuary legatee. (*Dodson v. Sammell, supra.*) An executor ceases to be liable when the estate is administered by the Court (*Waller v. Barrett*, 24 Beav. 413; 27 L. J., Ch. 214), and for this reason he is entitled to have the estate administered by the Court when it consists, to an appreciable extent, of leaseholds. (*Howard v. Easton*, 29 W. R. 885; 45 L. T. 136.)

If the executors or one of them assent to a specific bequest of the leaseholds, the legatee becomes liable as an ordinary assignee. He must pay the future rent, and bear any liability in respect of dilapidations or the like. (*Hawkins v. Hawkins*, 13 Ch. D. 470; 28 W. R. 526; 42 L. T. 306.) And he may bring an action of ejectment, even against the executor, to recover possession. (*Doe v. Guy*, 3 East, 120.)

Liability of legatee,

With respect to an assent, no specific form is necessary, and it may be either express or implied. (1 Roper on Legacies, 736, 3rd ed.) Whether there has been an assent or not, may involve matter of law, but is generally a question of fact. (*Elliott v. Elliott*, 9 M. & W. 27; *Mason v. Farnell*, 12 M. & W. 674.) Although an executor may assent to a bequest to himself, stronger evidence is requisite in such a case to show assent than where a stranger is legatee, for in the case of a stranger, the mere allowing him to act in the management of the property is strong evidence of assent. (*Hawkins v. Williams*, 10 W. R. 692.) The assent may be as to part only of a legacy. (*Elliott v. Elliott, supra, per Parke, B.*) Even where the leaseholds are comprised in a bequest of residue, the executors may assent as to the bequest of leaseholds or any other part of the residue without assenting as to the remainder. (*Austin v. Beddoe*, W. N. (1893) 78; but see *dictum* of Parke, B., to the contrary, 9 M. & W. 28.) The express assent of the executor, once given, vests the interest irrevocably, and cannot be recalled. (*Doe v. Guy*, 3 East, 120; but see 1 Roper on Legacies, 743.)

after assent of executor.

In the case of a testator or intestate dying before the 1st January, 1878, if leaseholds are charged with any sum by way of mortgage, equitable lien, or lien for unpaid purchase-money, and the testator have signified no contrary intention, the legatee is entitled to have the mortgage discharged out of the other personal estate. (*Solomon v. Solomon*, 33 L. J., Ch. 473; *Gall v. Fenwick*, 43 L. J., Ch.

As to charges upon the leaseholds.

178; *Hill v. Wormsley*, 4 Ch. D. 665; 46 L. J., Ch. 102; *Catty v. Bull*, 31 W. R. 854, which cases decide that the statutes 17 & 18 Vict. c. 113, and 30 & 31 Vict. c. 69, do not apply to leaseholds.) But as to persons dying on or after that date, the before-mentioned Acts are to apply, and the devisee or legatee or heir-at-law (*qu.* or next of kin) shall not be entitled to have such sum or sums discharged or satisfied out of the estate of the testator or intestate, unless (in the case of a testator) he shall have signified a contrary intention. (40 & 41 Vict. c. 34; *Broadbent v. Groves*, 52 L. J., Ch. 811; 24 Ch. D. 94; *Re Kershaw, Drake v. Kershaw*, 37 Ch. D. 674; 57 L. J., Ch. 599.) Where a testator's leaseholds are comprised with real estate in a mortgage, both shall, in the hands of the devisees and legatees thereof, contribute rateably to the payment of the mortgage debt. (*Trestrail v. Mason*, 7 Ch. D. 655; 47 L. J., Ch. 249; *Athill v. Athill*, 50 L. J., Ch. 123; 16 Ch. D. 211.)

Where leaseholds are a sole security by way of mortgage, the mortgage debt may be deducted from the value of the property, and probate duty only paid on the balance. (31 & 32 Vict. c. 124, s. 7.)

BY BANK-
RUPTCY,
under Bank-
ruptcy Act,
1869;

Under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), upon a composition under sect. 126, the property of the debtor never ceased to be his property. (*Ex parte Jones*, 23 W. R. 886; L. R., 10 Ch. 663; 44 L. J., Bkcy. 124; *Re Kearley and Clayton's Contract*, 47 L. J., Ch. 474; 7 Ch. D. 615; *Ex parte McDermott, Re McHenry*, 21 Q. B. D. 580; 36 W. R. 725.) Upon bankruptcy or liquidation by arrangement under sect. 125, the whole of the bankrupt's or liquidating debtor's property (sect. 15), including of course his terms of years and chattels real, vested, upon his appointment, in the trustee (sect. 17; *Ex parte Rabbidge, Re Pooley*, 26 W. R. 646; 8 Ch. D. 367), whose title to the property was conclusively evidenced by the certificate of his appointment signed by the registrar. (Sect. 18; sect. 125 (6).)

In the case of a liquidation under the Act the release of the trustee did not divest him of property of the debtor which had not been realized. (*Ex parte Witt, Re Armstrong*, 27 W. R. 888; 40 L. T. 836.) The Act of 1869 also contained powers of disclaimer in the case of onerous property similar to, but not so extended, as those of the Act of 1883 subsequently noticed.

Under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), under the Act of 1883. all proceedings commence by the presentation of a petition, upon which a receiving order may be made, the effect of which is that an official receiver is thereby constituted receiver of the debtor's property. (Sect. 9, sub-sect. 1.) The receiving order does not divest the debtor of his property (*Rhodes v. Dawson*, 55 L. J., Q. B. 134), but until the appointment of a trustee, the receiver may exercise the powers given to a trustee of selling the debtor's property. (*Turquand v. Board of Trade*, 11 App. Cas. 286; 55 L. J., Q. B. 417; 55 L. T. 30.) After a receiving order the creditors may accept a composition or scheme of arrangement, or an adjudication in bankruptcy may be resolved upon. (Sect. 15.) A composition or scheme may either precede or follow an adjudication in bankruptcy. (Sects. 18, 23.) If it precede adjudication, the official receiver puts the debtor, or, as the case may be, the trustee under the composition or scheme, into possession of the debtor's property. (Bankruptcy Rules, 1886, r. 208.) If it follow adjudication, the Court may make an order annulling the bankruptcy, and vesting the property in the debtor, or in such other person as it may appoint. (Sect. 23, sub-sect. 2.) The Court may annul a composition or scheme (sect. 18, sub-sect. 11), in which case the debtor's property reverts to the official receiver unless the Court directs otherwise. (Rule 212.)

After adjudication a trustee may be appointed (sect. 21), in whom, on appointment, vests the debtor's property, including his terms of years (sect. 54; *Titterton v. Cooper*, 9 Q. B. D. 473; 51 L. J., Q. B. 472), or such of them as are not forfeited by the act of bankruptcy. (*Ex parte Gould, Re Walker*, 13 Q. B. D. 454; 51 L. T. 368; *Ex parte Leather Sellers Co., Re Tickle*, 3 Morr. 126.) The trustee's title is evidenced by the certificate of appointment. (Sects. 54, 138.) The provisions of the Act, relating to the realization and administration of the debtor's property by a trustee in bankruptcy, apply to a trustee under a composition or scheme (sect. 18, sub-sect. 13), so far as the terms of the composition or scheme admit. A trustee in bankruptcy may adopt the benefit of an agreement or option for a lease to which the bankrupt was entitled (*Crosbie v. Tooke*, 1 My. & K. 431; *Buckland v. Papillon*, L. R., 1 Eq. 477; 2 Ch. 67; 36 L. J., Ch. 81); he may sell and assign the bankrupt's property (sect. 56), and, generally, exercise all Terms of years vest in trustee, who may sell or assign,

such powers over it as the bankrupt might have exercised. (Sect. 44, sub-sect. 2 (i).)

or disclaim.

When any part of the property consists of land of any tenure burdened with onerous covenants, or is unsaleable or not readily saleable by reason of its binding the possessor thereof to the performance of any onerous act, or the payment of any sum of money, the trustee, notwithstanding he has endeavoured to sell or has taken possession, or has exercised any acts of ownership in relation thereto, may, by writing signed by him (not by his solicitor, *Wilson v. Wallani*, 5 Ex. D. 155; 49 L. J., Ex. 437), disclaim such property. (Sect. 55, sub-sect. 1.)

What property may be disclaimed.

The section applies to property of the bankrupt held in trust for another (*Ex parte Monkhouse, Re Maughan*, 14 Q. B. 956; 54 L. J., Q. B. 128), to property held under a Crown lease (*Ex parte Commissioners of Woods and Forests, Re Thomas*, 21 Q. B. D. 380; 57 L. J., Q. B. 574), to a tenancy under an attornment clause in a mortgage deed (*Ex parte Isherwood, Re Knight*, 22 Ch. D. 354; 52 L. J., Ch. 370), and to a tenancy which has expired (*infra*, p. 463), but not to the equity of redemption of leasehold property which the bankrupt has mortgaged by an assignment of the entire residue of the term. (*Ex parte Official Receiver, Re Gee*, 24 Q. B. D. 65; 59 L. J., Q. B. 16.) And a trustee cannot disclaim a part only of the property included in a demise. (*Ex parte Allen, Re Fussell*, 51 L. J., Ch. 725; 20 Ch. D. 341; *Ex parte Glegg, Re Latham*, 19 Ch. D. 7; 51 L. J., Ch. 367.)

When without leave.

The trustee may not disclaim without the leave of the Court (sect. 55, sub-sect. 3), except in the cases prescribed by the Bankruptcy Rules, 1890, r. 69, viz.:—(i) Where the bankrupt has not sub-let the demised premises or any part thereof, or created a mortgage or charge upon the lease, and (a) the rent reserved and real value of the property leased, as ascertained by the property tax assessment, are less than 20% per annum, or (b) the estate is administered under the provisions of sect. 121 of the Act of 1883 regulating small bankruptcies (*Ex parte Zerfass, Re Sandwell*, 14 Q. B. D. 960; 54 L. J., Q. B. 323), or (c) the trustee serves the lessor with notice of his intention to disclaim, and the lessor does not, within seven days after the receipt of such notice, give notice to the trustee, requiring the matter to be brought before the Court. (ii) Where the bankrupt has sub-let the demised premises

or created a mortgage or charge upon the lease, and the trustee serves the lessor and the sub-lessee or the mortgagees with notice of his intention to disclaim, and neither the lessor nor the sub-lessee or the mortgagees, or any of them, within fourteen days after the receipt of such notice require or requires the matter to be brought before the Court. Except as provided by the rule, the disclaimer of a lease without the leave of the Court shall be void. (Rule 69 (3).)

Where no leave is necessary, the Court has no power to impose terms upon a disclaiming trustee (*Ex parte Zerfass, supra*), but where such leave is necessary the Court, before or upon granting it, may require such notices to be given to persons interested, and impose such terms as a condition of granting leave, and make such orders with respect to fixtures, tenant's improvements, and other matters arising out of the tenancy, as the Court thinks just. (Sect. 55, sub-sect. 3.)

If leave required, Court may impose terms.

The application for leave to disclaim is by notice of motion served upon the persons whose interests may be affected. It may be served out of the jurisdiction upon persons resident abroad. (*Ex parte Paterson, Re Rathbone*, 56 L. J., Q. B. 504; 57 L. T. 420.) Any number of mortgagees or sub-lessees who are interested in parts only of the property sought to be disclaimed may be joined in an application against one landlord, but different landlords of distinct and different properties cannot be joined as respondents to one application for leave to disclaim the aggregate property. (*Re Whitaker*, 21 Q. B. D. 261; 57 L. J., Q. B. 527.)

Application for leave, by motion.

In determining whether or not leave to disclaim should be given, the Court will only have regard to the interests of persons concerned in the administration of the bankrupt's estate. (*Ex parte East and West India Dock Co., Re Clarke*, 17 Ch. D. 759; 50 L. J., Ch. 789; *Ex parte Edmonds, Re Tipping*, 48 L. T. 77.) But the Court has a judicial discretion, which will not be interfered with in imposing such terms as will meet the justice of the case. (*Ex parte Ladbury, Re Turner*, 17 Ch. D. 532; 50 L. J., Ch. 838.)

Rules regulating leave to disclaim.

A lease may be disclaimed notwithstanding the term has expired by effluxion of time or otherwise between the date of the appointment of the trustee and the disclaimer, since otherwise the trustee would be liable as assignee of the

lease during the period it was vested in him. (*Ex parte Hart Dyke, Re Morrish*, 22 Ch. D. 410; 52 L. J., Ch. 570; *Ex parte Paterson, Re Throckmorton*, 27 W. R. 928; 11 Ch. D. 908.) The fact that the trustee's occupation has been beneficial, and that the landlord has been kept out of possession, are special circumstances which justify the imposition of terms as a condition of the leave to disclaim. (*Ex parte Isherwood, Re Knight*, 22 Ch. D. 384; 52 L. J., Ch. 370; *Ex parte Izard, Re Bushell*, 23 Ch. D. 115; 48 L. T. 751; *Ex parte Arnal, Re Witton*, 24 Ch. D. 26; 53 L. J., Ch. 134; *Ex parte Good, Re Salkeld*, 54 L. J., Q. B. 96; 13 Q. B. D. 731.)

Limit of
time for
disclaimer.

The disclaimer may be within twelve months after the first appointment of a trustee, and should the property to be disclaimed not come to his knowledge within a month from the date of his appointment, he may disclaim at any time within twelve months after he first became aware thereof, and such period of twelve months may be extended by the Court. (Bankruptcy Act, 1883, s. 55, sub-s. 1, as amended by the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71, s. 13).) Special circumstances would be required to obtain an extension of the time (*Ex parte Foreman, Re Price*, 33 W. R. 139; 13 Q. B. D. 466); and where written application is made by any person interested in the property (including the landlord, *Ex parte Mackay, Re Page*, 14 Q. B. D. 401), requiring the trustee to decide whether he will disclaim or not, he must elect by notice in writing within twenty-eight days after the receipt of the application or such extended period as may be allowed by the Court. (Sect. 55, sub-sect. 4.) If the trustee deny the receipt of the application, the lessor must prove its delivery; merely posting it is not sufficient to satisfy the statute. (*Reed v. Harvey*, 5 Q. B. D. 184; 49 L. J., Q. B. 295.) An application for extended time should be made within the twenty-eight days. The Court, however, has power, which it will only exercise under very special circumstances, to extend the time after the twenty-eight days. (*Ex parte Lovering, Re Jones*, 43 L. J., Bkcy. 94; L. R., 9 Ch. 586; *Ex parte Moore, Re Stokoe*, 2 Ch. D. 802; 35 L. T. 386; *Ex parte Harris, Re Richardson*, 16 Ch. D. 613; 29 W. R. 899.) Where a trustee, having failed to disclaim within the twenty-eight days, subsequently applied to the Court for extended time, he was ordered personally to pay the costs of the application and one month's rent.

(*Ex parte Mackay, Re Page*, 14 Q. B. D. 401; 33 W. R. 825.) No appeal lies against an order to disclaim, after the trustee has, in pursuance thereof, executed a disclaimer. (*Ex parte Ditton, Re Woods*, 3 Ch. D. 459; 45 L. J., Bkcy. 141; *Ex parte Sadler, Re Hawes*, 19 Ch. D. 122; 51 L. J., Ch. 201; *Ex parte Edmonds, Re Tipping*, 48 L. T. 77.)

The disclaimer operates to determine, as from the date of the disclaimer, the rights, interests and liabilities of the bankrupt and his property, in or in respect of the property disclaimed, and discharges the trustee from all personal liability in respect of the property disclaimed, as from the date when the property vested in him. (Sect. 55, subsect. 2.) But the disclaimer does not discharge the trustee from liability for wrongful acts committed before disclaimer, and a trustee was held personally liable for selling hay and straw grown on a farm contrary to the custom of the country. (*Schofield v. Hincks*, 58 L. J., Q. B. 147; 60 L. T. 573.)

From when disclaimer operates.

Where a trustee disclaims a leasehold interest he shall forthwith file the disclaimer with the proceedings in the Court. Until filed the disclaimer is inoperative. (Bankruptcy Rules, 1890, r. 69 (4).)

A trustee who does not disclaim remains personally liable as an ordinary assignee, that is, for rent from the date of his appointment, and not that accruing before, and, on such covenants in the lease as bind assigns, in respect of breaches committed during the time he retains that character, subject to the right of indemnity out of the bankrupt's estate (*Titterton v. Cooper*, 51 L. J., Q. B. 472; 9 Q. B. D. 473; *Alloway v. Le Steere*, 52 L. J., Q. B. 38; 10 Q. B. D. 22; *Wilson v. Wallani*, 49 L. J., Ex. 437; 5 Ex. D. 155; *Ex parte Dressler, Re Solomon*, 48 L. J., Bkcy. 20); and it is immaterial whether he enter into actual possession of the premises or not. (*Ib.*)

Effect of non-disclaimer;

After the discharge of the trustee the Court of Bankruptcy has no power to make an order upon him for payment of rent. (*Ex parte Carter, Re Ware*, 8 Ch. D. 731; 39 L. T. 185.) And the trustee may free himself from all future liability under a lease by an assignment, even to a pauper (*Hopkinson v. Lovering*, 11 Q. B. D. 92; 52 L. J., Q. B. 391), notwithstanding the lease contain a covenant against assignment without licence (*Doe v. Beran*, 3 M. & S. 353), and even though notice to disclaim may have been given by the landlord, and the time for

disclaimer may not have expired. (*Hopkinson v. Lovering, supra.*)

of disclaimer.

If the trustee elect to disclaim, the liabilities of the bankrupt and his estate are determined, and, subject to any terms imposed, the trustee discharged from personal liability (*Lowrey v. Barker*, 49 L. J., Ex. 433; 5 Ex. D. 170), even for the beneficial occupation he may have had prior to the disclaimer. (*Gabriel v. Blankenstein*, 33 W. R. 151.) The disclaimer does not, however, except so far as is necessary for the purpose of releasing the bankrupt and his property, and the trustee from liability, affect the rights or liabilities of any other person. (Sect. 55, sub-sect. 2; *Smyth v. North*, L. R., 7 Ex. 242; 41 L. J., Ex. 103; *Ex parte East and West India Dock Co., Re Clarke*, 17 Ch. D. 759; 50 L. J., Ch. 789; *Harding v. Preece*, 9 Q. B. D. 281; 51 L. J., Q. B. 515.) Therefore, when the bankrupt is only an assignee of a lease, or has sub-let the premises, the effect of the disclaimer is not to put an end to the lease itself, but only to wipe out the rights of property and liability of the bankrupt in respect thereof. Thus, when the bankrupt is an assignee, the original lessee continues liable to the lessor under the original lease (*Hill v. East and West India Dock Co.*, 53 L. J., Ch. 842; 9 App. Cas. 448), so does a surety for payment of rent by the bankrupt. (*Harding v. Preece, supra.*) On the other hand, where the bankrupt is the original lessee but has underlet the premises, the disclaimer does not destroy the underlease, but the underlessee becomes liable upon the covenants in the original lease, and so long as he observes them cannot be ejected. (*Ex parte Walton, Re Lery*, 17 Ch. D. 746; 50 L. J., Ch. 657; *Smalley v. Hardinge*, 7 Q. B. D. 524; 50 L. J., Q. B. 367.)

Vesting order
in respect of
disclaimed
property.

The Court, on the application of any person either claiming an interest in the disclaimed property, or under any liability not discharged by the Act in respect of any disclaimed property, may, on hearing such persons as it thinks fit, make an order vesting the property in any person entitled thereto. Provided always, that in the case of leaseholds a vesting order shall not be made in favour of any person claiming under the bankrupt as underlessee or mortgagee by demise, except subject to the same liabilities and obligations as the bankrupt was subject to under the lease at the date the bankruptcy petition was filed, and any mortgagee or underlessee declining to accept

a vesting order upon such terms shall be excluded from all interest in and security on such property. (Sect. 55, sub-sect. 6.)

Under this section it was doubtful whether the person in whose favour a vesting order was made took, not as an ordinary assignee, but subject to the same liabilities as the bankrupt when he was the original lessee. (*Ex parte Cloth Workers' Co., Re Finley*, 21 Q. B. D. 475; 57 L. J., Q. B. 626; *Ex parte Shilson, Re Cock*, 20 Q. B. D. 343; 57 L. J., Q. B. 169.) But it is enacted by the Bankruptcy Act, 1890, that the Court may modify the terms prescribed by the proviso to the last cited sub-section so as to make the person in whose favour the vesting order may be made subject only to the same liabilities and obligations as if the lease had been assigned to him at the date when the bankruptcy petition was filed; and (if the case so requires) as if the lease had comprised only the property comprised in the vesting order. (53 & 54 Vict. c. 71, s. 13.)

Upon an application for a vesting order the Court may order such persons to be served as it thinks fit. The lessor and an assignee of the lease will not always be necessary, but will generally be proper, parties to be served. (*Ex parte Morgan, Re Morgan*, 22 Q. B. D. 592; 58 L. J., Q. B. 295.) The lessor may give notice of an application for a vesting order as soon as he is served with notice of motion to disclaim. (*Re Britton*, 61 L. T. 52; 37 W. R. 621.)

A mortgagee by underlease cannot escape his obligation to take a vesting order or forfeit his interest in the property by assigning his mortgage to a trustee for himself, a man of straw, willing to take a vesting order under the Act. (*Re Smith, Ex parte Hepburn*, 25 Q. B. D. 536; 63 L. T. 621.)

Any person injured by the operation of a disclaimer shall be deemed a creditor, and may prove to the extent of his injury. (Sect. 55, sub-sect. 7.) In the case of a lease disclaimed, the measure of damages is the difference between the rent reserved for the residue of the term from the commencement of the bankruptcy, and the present letting value (*Ex parte Llynvi Coal and Iron Co., Re Hide*, L. R., 7 Ch. 28; 41 L. J., Bkcy. 5), together with the loss sustained by non-compliance with the tenant's covenants to improve or repair the premises during the unexpired residue of the term. (*Ex parte Blake, Re McEwan*, 11 Ch. D. 572; 40 L. T. 859.) In

Person
injured by
disclaimer
may prove.

the case of an underlease at a less rent than that reserved by the original lease, the measure of damages is the difference between the rent the bankrupt agreed to pay, and the higher rent reserved by the superior lease. (*Ex parte Walton, Re Levy*, 17 Ch. D. 746; 50 L. J., Ch. 657.)

Official
liquidator of
a company.

Under sect. 203 of the Companies Act, 1862 (25 & 26 Vict. c. 89), the Court may order that all the property of a company being wound up shall vest in an official liquidator; but in case it does so the liquidator does not become personally liable for the payment of rent. (*Graham v. Edge*, 57 L. J., Q. B. 406; 20 Q. B. D. 683.)

SECT. 3.—Underleases.

Underleases.

Though a professed underlease for an equal or greater term than the underlessor possesses amounts to an assignment (*Beardman v. Wilson*, L. R., 4 C. P. 57; 38 L. J., C. P. 91; 1 Platt, 9—19), yet an underlease from year to year (*Pike v. Eyre*, 9 B. & C. 909; *Curtis v. Wheeler*, Mo. & M. 493), or for a term of years (*Oxley v. James*, 13 M. & W. 209), by a tenant from year to year, has not that effect; since his estate is for an indefinite period, and may or may not exceed the term he carves out of it.

The relation between an underlessor and his tenant is the ordinary relation of landlord and tenant. Mortgages of leaseholds are frequently by way of underlease. (2 Dav. Conv. 668.)

Rights and
liabilities
under original
lease.

An underlessee for a shorter term is not an assignee of the term, and therefore there is neither privity of contract or estate between him and the original lessor, and he is neither liable to be sued under, nor entitled to sue for the benefit of, the covenants and conditions contained in the original lease. (*Holford v. Hatch*, 1 Doug. 183; *Williamson v. Williamson*, L. R., 9 Ch. 729; 43 L. J., Ch. 738; *Hornby v. Cardwell*, 8 Q. B. D. 329; 51 L. J., Q. B. 89; but see *Silcock v. Farmer*, 46 L. T. 404.)

But an underlessee in possession is liable to an injunction for breach of covenants contained in the original lease (*Cosser v. Collinge*, 3 My. & K. 283; *Parker v. Whyte*, 32 L. J., Ch. 520; *Wilson v. Hart*, 35 L. J., Ch. 569; L. R., 1 Ch. 463), or in any subsequent assignment thereof. (*Clements v. Welles*, 35 L. J., Ch. 265; L. R., 1 Eq. 200.)

Moreover, the underlessee is always liable to have his goods distrained for rent by the superior landlord, or himself ejected for breaches of covenants contained in the original lease. Rent due under.

Where a person who held premises under a lease which contained a covenant not to use the premises for any business, sub-let to another person to whom he gave express permission to carry on business, it was held that the original lessor was entitled to damages as against the sub-lessor and an injunction against the sub-lessee, and that the latter was not entitled under the third party procedure to any relief against the sub-lessor for breach of covenant for quiet enjoyment. (*Tritton v. Bankart*, 56 L. T. 306.)

An underlessee who covenants in terms to perform the covenants in the original lease is liable to his lessor, as upon a contract for indemnity, for costs incurred in defending an action for breaches of covenant in the original lease. (*Hornby v. Cardwell*, *supra*.) But where there is no reference to the original lease, covenants similar in terms to those in the original lease will not amount to a contract for indemnity. (*Pontifex v. Foord*, 53 L. J., Q. B. 321; 12 Q. B. D. 152; *Logan v. Hall*, 16 L. J., C. P. 252; 4 C. B. 598.) How far underlessee bound to indemnify.

If one of two underlessees pays the rent reserved under the original lease, even under a threat of distress, he has no right of contribution as against another underlessee. (*Hunter v. Hunt*, 1 C. B. 300; 14 L. J., C. P. 113; *Johnson v. Wild*, 44 Ch. D. 146; 59 L. J., Ch. 322.) Contribution between underlessees, where entire rent paid by one.

We have previously noticed the power of the Court to protect an underlessee on forfeiture of the superior lease. (55 & 56 Vict. c. 13, s. 4, *ante*, p. 375.)

CHAPTER XI.

EJECTMENT.

SECT. 1.—*On the Right of Action for the Recovery of Land.*

MUCH of the old law as to ejectment (or, according to the more cumbrous phrase invented under the Judicature Acts, recovery of land) is obsolete. An action of ejectment stands very much upon the same footing as any other action, and the object of this chapter is to point out briefly the mode of procedure by which, when a tenancy has expired by effluxion of time, or been determined either by determination of will, demand of possession, notice to quit, disclaimer, forfeiture, or any of the different methods previously considered (Chap. VIII.), a landlord may enforce the law, and obtain possession of the lands or tenements wrongfully withheld from him.

Person having legal right to actual possession may enter without any legal formality, but must do so peaceably.

Period of limitation.

Special advantages of landlords.

At common law.

Any person who has a legal right to the actual possession of lands or tenements, may enter and take possession without any legal formality; but he must do so peaceably, for to assert his right by force (except in manner before indicated, *ante*, Chap. IX. s. 5, pp. 430, 431) is to break the law (*Taylor v. Cole*, 3 T. R. 295; *Taunton v. Costar*, 7 T. R. 431; *Turner v. Meymott*, 1 Bing. 158; *Butcher v. Butcher*, 7 B. & C. 399), and render himself liable to indictment. Where, therefore, the right of entry is fairly contested, it is always advisable to commence an action for the recovery of the lands or tenements. The action must be commenced within twelve years after the right of entry accrued. (*Ante*, Chap. IX. s. 6.)

In an action by a landlord against a tenant, to recover the possession of lands, houses, and other tenements, the plaintiff enjoys many special advantages both at common law and by statute. He need not generally prove his own title, for, as we have seen (*ante*, pp. 21, 23), a tenant

who has come in under or paid rent cannot, except under very exceptional circumstances, dispute the lessor's title, whether the original lessor or his assignee be plaintiff (*Gouldsworth v. Knights*, 11 M. & W. 337; *Cuthbertson v. Irving*, 29 L. J., Ex. 485); and a person claiming under the tenant is equally estopped (*Doe v. Mills*, 2 Ad. & E. 17; *L. & N. W. Ry. Co. v. West*, L. R., 2 C. P. 553), whether he be an assignee of the term or a mere licensee. (*Doe v. Baytup*, 3 Ad. & E. 188.) Thus the action as between landlord and tenant is shorn of many of the difficulties usually found in proceedings to recover the possession of land, where the plaintiff must generally recover upon the strength of his own, and not upon any weakness or defect in the defendant's title. (*Martin v. Strachan*, 5 T. R. 107, n.; *Doe v. Thompson*, 13 Q. B. 674; *Doe v. Powell*, 1 Ad. & E. 531; *Doe v. Barber*, 2 T. R. 749; and see *Richards v. Richards*, 15 East, 294, note (a).)

In general, therefore, the landlord need only prove—

(1) The contract of tenancy, which, if by deed or in writing, must be done by production of the lease or counterpart (*Roe v. Davis*, 7 East, 363), or, if by parol, by evidence of a person present at the making, or by the oral admissions of the defendant (2 Phil. Ev. 7th ed. 270), which may be admitted to prove the terms of the lease. (*Howard v. Smith*, 3 M. & G. 254; and see *Slatterie v. Pooley*, 6 M. & W. 664.)

Proof by landlord in the action for the recovery of lands, houses, &c.

(2) That he has a legal right to the actual possession of the property by reason of the expiration or determination of the tenancy (a) by effluxion of time, or (b) by due notice to quit where the tenancy was from year to year (but see *Vivian v. Moat*, 16 Ch. D. 730; 29 W. R. 504), or for other indefinite period, as where, subsequently to the expiration of the lease, the landlord has accepted payment of rent due at a later period, and thereby created a new tenancy from year to year (*Doe v. Stennett*, 2 Esp. 717; *Bishop v. Howard*, 2 B. & C. 100; *Doe v. Amey*, 12 A. & E. 476; *Doe v. Crago*, 6 C. B. 90); or (c) by a lawful demand of possession made, as where there exists, either by construction of law or otherwise, a tenancy at will not yet legally determined by entry or otherwise (*ante*, p. 3); or (d) by breach of covenant, proving that the lease contained a proviso or condition of re-entry to take effect on some act or event which has

happened, or on the breach of some covenant or stipulation which has not been performed (*Hayne v. Cummings*, 16 C. B., N. S. 421), and that the proviso for re-entry is applicable to such covenant or stipulation (*Doe v. Phillips*, 2 Bing. 13; *Doe v. Golding*, 6 Moore, 231; *Doe v. Kneller*, 4 C. & P. 3; *Doe v. Bowditch*, 8 Q. B. 973); and that the notice, if any, required by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 14, has been given and not complied with. (*Ante*, p. 372.)

Proceedings
by landlord—
on forfeiture;

In the last-mentioned event the landlord may either enter and take actual possession (*Davis v. Burrell*, 10 C. B. 821; *Davis v. Eyton*, 7 Bing. 154), or maintain ejectment without such entry (*Goodright v. Cator*, 2 Doug. 477; *Doe v. Abel*, 2 M. & S. 541), which is generally, it is submitted, the most advisable course; but he cannot do either if he waive the forfeiture (not being a continuing forfeiture) (*Arnsby v. Woodward*, 6 B. & C. 519; and see *ante*, p. 363), nor after he has parted with his reversion (*Fenn v. Smart*, 12 East, 444; *Doe v. Edwards*, 5 B. & Ad. 1065; *Doe v. Ongley*, 10 C. B. 25), nor after his reversion has been merged and extinguished. (*Webb v. Russell*, 3 T. R. 393.) But a mortgagor, as to whose lands no notice of his intention to take possession or enter into receipt of the rents and profits has been given by the mortgagee, may now sue in ejectment under sect. 25, sub-sect. 5, of the Judicature Act, 1873 (36 & 37 Vict. c. 66), and the assignee of the reversion of a lease, containing the usual power of re-entry to the lessor and his assigns, may maintain ejectment on breach of a general covenant to repair, without giving notice to the lessee of his being entitled to the reversion. (*Scaltock v. Harston*, 45 L. J., C. P. 125; 1 C. P. D. 106; 24 W. R. 431.)

When a person seeks to recover possession of land upon an equitable title, he must make the person in whom the legal estate is vested a party. (*Allen v. Woods*, 68 L. T. 143.)

for breach of
covenant;

In all cases of ejectment for forfeiture by breach of covenant, it rests upon the lessor to show by strict proof that the lease which he has granted has been forfeited by the lessee. (*Doe v. Whitehead*, 8 A. & E. 571; *Toleman v. Portbury*, L. R., 5 Q. B. 288; 39 L. J., Q. B. 136.)

non-payment
of rent.

Nor, as we have already seen (*ante*, p. 368), can a landlord at common law take advantage of a forfeiture or maintain ejectment for non-payment of rent without a

formal demand thereof, unless there be some express condition or proviso in the lease or agreement giving the landlord a right to re-enter and determine the lease or tenancy without such demand (Litt. s. 325; *Doe v. Golding*, 6 Moore, 231; *Doe v. Kneller*, 4 C. & P. 3; *Brewer v. Eaton*, 3 Doug. 230; *Doe d. Dixon v. Roe*, 7 C. B. 134; *Hill v. Kempshall*, 7 C. B. 975; *Phillips v. Bridge*, L. R., 9 C. P. 48; 43 L. J., C. P. 13), or a right to enter and hold the premises until the arrears be satisfied. (Litt. s. 327; *Jemott v. Cowley*, 1 Saund. 112 c; *Doe v. Horsley*, 1 A. & E. 766; *Doe v. Boulter*, 6 A. & E. 675.) If the proviso allow a specified number of days for payment of rent after it becomes due, no forfeiture can accrue by non-payment until such time has elapsed. (Plow. 172 d; *Doe d. Dixon v. Roe*, 7 C. B. 134.)

By the C. L. P. Act, 1852, s. 210 (sects. 208—220 of which Act were excepted from the statutes repealed by 46 & 47 Vict. c. 49), in all cases between landlord and tenant, when one half-year's rent is in arrear, and the landlord or lessor has by law a right of re-entry for the non-payment thereof, such landlord or lessor may without any formal demand or re-entry serve a writ of ejectment, and in case of judgment against the defendant for non-appearance, if it appear to the Court by affidavit, or be proved upon the trial, in case the defendant appears, that half-a-year's rent was due before the writ was served and no sufficient distress to be found on the premises counter-vailing the arrears then due, and that the lessor had power to re-enter, then the lessor shall recover judgment and execution in the same manner as if the rent in arrear had been legally demanded and a re-entry made. (*Ante*, p. 369.)

Statutory enactment where six months' rent in arrear and no sufficient distress.

15 & 16 Vict. c. 76, s. 210.

The statute only applies where the instrument of tenancy itself contains an express proviso or condition for re-entry for non-payment of rent.

By sect. 213 of the C. L. P. Act, 1852, where any tenant holding under a lease or agreement in writing for any term certain, or from year to year, holds over after the term has expired by effluxion of time, or has been determined by a regular notice to quit, and after a lawful demand of possession in writing, refuses to deliver up possession, and the landlord thereupon commences an action of ejectment, he may compel the tenant to find sureties for payment of the costs and damages, which shall

15 & 16 Vict. c. 76, s. 213.

Tenant holding over after term has expired may be compelled to find sureties for payment of costs and damages,

before he may
defend.

be recovered in the action before he will be permitted to defend it.

The special and summary procedure which was provided by subsequent sections of the Act to recover in ejectment under this section, has been rendered practically obsolete by the fuller and more simple and speedy remedy introduced by the R. S. C. 1883, Ord. III. r. 6, and Ord. XIV., for the recovery of possession where the term has expired or the tenancy been determined by notice to quit, which remedy is not restricted, as the Act of 1852 was, to cases where there was a written agreement or lease, and where there was a term certain or from year to year, and a written demand of and refusal to deliver up possession.

Damages for
mesne profits
recoverable
by landlord.
15 & 16 Vict.
c. 76, s. 214.

To render a subsequent action of trespass for mesne profits unnecessary, it was enacted by the 214th section of the C. L. P. Act, 1852, that wherever on the trial of any ejectment by a landlord against a tenant, such tenant or his attorney has been served with due notice of trial, the judge shall permit the claimant, after proof of his right to recover possession, to go into evidence of the mesne profits which have accrued from the determination of the tenant's interest to verdict, or some preceding day specially mentioned therein; and the jury, finding for the plaintiff, shall give their verdict both as to the recovery of the premises and as to the amount of damages for mesne profits, and thereupon the landlord shall have judgment accordingly, and shall not be barred from bringing any action for mesne profits accruing between verdict and delivery of possession.

Sect. 214 is
not confined
to cases where
security has
been given
under s. 213.

This section is not confined to cases where security has been given under sect. 213. Mesne profits may be recovered under sect. 214, although the writ and issue do not contain any claim in respect of them (*Smith v. Tett*, 9 Exch. 307); but strict proof of title being required where the defendant does not appear, it is sometimes advisable for a landlord to exercise the option reserved to him (sect. 218, C. L. P. Act, 1852) and proceed in the usual manner, and afterwards to bring an action for mesne profits, or for double value or double rent (*ante*, Chap. IX., sect. 5, pp. 431—434), because his title will then be protected by estoppel through the judgment in ejectment. (Day's C. L. P. Acts, 210.)

At the trial plaintiff must prove himself to be the landlord, and defendant tenant of the premises claimed, his right to recover possession thereof, service of notice of trial

(unless the tenant appears, *Doe v. Hodgson*, 12 A. 135), and the amount of mesne profits due.

Before dealing with the mode of proceeding by action to recover possession of land, it will be convenient to point out that, under the Companies Act, 1862, in the case of a company being wound up, an action of ejectment cannot be brought against the company except with the leave of the Court in which the winding-up is pending. (25 & 26 Vict. c. 89, s. 87.) But an application by summons in the winding-up proceedings may be made by the landlord of the company to re-enter under a forfeiture clause in the lease. (*General Share and Trust Co. v. Wetley Brick Co.*, 20 Ch. D. 260 ; 30 W. R. 445.)

So an application for possession against a bankrupt and his trustee may be made in the bankruptcy proceedings. (*Ex parte Fletcher, Re Hart*, 39 L. T. 187 ; 26 W. R. 843 ; 9 Ch. D. 381.)

SECT. 2.—*Action in the High Court for the Recovery of Land.*

Formerly an action of ejectment differed in form and procedure from other actions. Now all actions have been assimilated, and are commenced by a writ of summons (R. S. C. 1883, Ord. II. r. 1), which must be in one of the forms prescribed by the rules (*Ib.* r. 3), and may be either with a special indorsement or a general indorsement. We propose to deal briefly with the procedure under each form of indorsement, as it affects actions for the recovery of land.

(a) *By specially indorsed Writ.*

The Judicature Acts, and the rules thereunder, have provided by means of a specially indorsed writ a simple and expeditious means of obtaining judgment in a number of simple cases in which there is no real defence to the action. The benefit of this summary procedure was, by the R. S. C. 1883, extended to a class of simple cases in which a landlord claims possession from his tenant.

Ord. III. r. 6, provides that "in actions for the recovery of land, with or without a claim for rent, or mesne profits, by a landlord against a tenant whose term has expired, or has been duly determined by notice to quit, or against

Special indorsement,

for possession with or without rent or mesne profits;

persons claiming under such tenant, the writ of summons may at the option of the plaintiff be specially indorsed with a statement of his claim" to the effect of the Form App. C., Sect. VII. No. 1. If it claim any relief not mentioned in the rule, *e.g.*, an injunction, or rent and dilapidations, it is not a special indorsement. (*Yeatman v. Snow*, 28 W. R. 574; 42 L. T. 502; *Clarke v. Berger*, 36 W. R. 809; see also *Imbert-Terry v. Carver*, 34 Ch. D. 506; 56 L. J., Ch. 716.) But the indorsement need not have the word "delivered," or the date of delivery, at the end. (*Veale v. Automatic, &c. Co.*, 18 Q. B. D. 631; 56 L. J., Q. B. 307.)

only applies
where no title
to prove;

The rule is only applicable to cases in which the direct relation of landlord and tenant exists, either by agreement, payment of rent, attornment, or estoppel, and not to cases where it is necessary for the plaintiff to prove a devolution of title. (*Casey v. Hellyer*, 55 L. J., Q. B. 207; 17 Q. B. D. 97.) But it applies to a tenancy created by attornment in a mortgage deed (*Hall v. Comfort*, 18 Q. B. D. 11; 56 L. J., Q. B. 185; *Daubuz v. Lavington*, 13 Q. B. D. 347; 53 L. J., Q. B. 283; *Mumford v. Collier*, 25 Q. B. D. 279); and to a tenancy at will. (*Jerred v. Edwards*, 92 L. T. Journ. 8.) In the latter case no notice to quit is necessary, the tenancy being determined by the issue of the writ. (*Ib.*)

and where
the term has
expired or
determined
by notice.

The procedure only applies to tenancies that have expired by effluxion of time, or been determined by regular notice to quit. A tenant who has surrendered his term but refuses to quit the premises cannot be proceeded against under this rule. (*Doe d. Tindal v. Roe*, 2 B. & Ad. 922.) Nor does the rule apply where the landlord claims possession under a proviso for re-entry for forfeiture. (*Burns v. Walford*, W.N. (1884) 31; *Mansergh v. Rimell*, W.N. (1884) 34; *Doe v. Sharpley*, 15 M. & W. 558; see *Barlow v. Teal*, 15 Q. B. D. 501; 54 L. J., Q. B. 564; and *Friend v. Shaw*, 20 Q. B. D. 374; 57 L. J., Q. B. 225.)

Service of
writ.

A specially indorsed writ may, like an ordinary writ, be served at any hour of the day. (*Murray v. Stephenson*, 19 Q. B. D. 60; 56 L. J., Q. B. 647.)

The use of a special indorsement is optional with the plaintiff, but where the writ is specially indorsed no further statement of claim is required. (Ord. XX. r. 1 (a).)

Judgment in
default of
appearance,

Where the defendant makes default in entering an appearance in an action for the recovery of land, the plain-

tiff shall be at liberty to enter judgment for possession and mesne profits, or arrears of rent claimed. (Ord. XIII. rr. 8, 9.)

Where the defendant appears to a writ of summons specially indorsed under Ord. III. r. 6, the plaintiff may on affidavit made by himself, or by any person who can swear positively to the facts, verifying the cause of action, and the amount claimed (if any), and stating that in his belief there is no defence to the action, apply to a judge for liberty to enter final judgment for recovery of the land (with or without rent or mesne profits), as the case may be, and costs. The judge may thereupon, unless the defendant by affidavit or otherwise shall satisfy him that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend, make an order empowering the plaintiff to enter judgment accordingly. (Ord. XIV. r. 1.)

under
Ord. XIV.

The application for leave to enter final judgment is by summons returnable not less than four clear days after service, accompanied by a copy of the affidavit and exhibits referred to therein. (Ord. XIV. r. 2.) The defendant may show cause against the application by affidavit, which should state whether the defence goes to the whole or part only, and (if so) to what part of the plaintiff's claim. (Rule 3.)

Application
for judgment.

Leave to defend may be given unconditionally or on such terms as the judge may think fit (rule 6); and where the defence only applies to part of the claim leave to defend may be limited to that part. (Rule 4.) And leave may be given to one defendant and judgment entered against another. (Rule 5.) Leave to defend is only refused where it is clear there is no defence to the action. (*Thompson v. Marshall*, 41 L. T. 720.) Therefore, if the defendant states facts which, if proved, would constitute a good defence on the merits, or from which it might be said there was a plausible defence, leave to defend will be given (*Ray v. Barker*, 4 Ex. D. 279; 48 L. J., Ex. 569; 1 Chit. Arch. 270, 14th ed.); but where the facts stated do not suggest a real or valid defence, and if put in could only be for the purpose of delay, leave will be refused. (*Lloyds Banking Co. v. Ogle*, 1 Ex. D. 262; 34 L. T. 584, per Bramwell, B.; *Anglo-Italian Bank v. Wells*, 38 L. T. 197.)

Leave to
defend.

There is an appeal from the decision of the master to a judge at chambers within four days (Ord. LIV. r. 21), and

Appeal.

from either master or judge to a Divisional Court within eight days; or, if no such Court shall sit within the eight days, on the first day after the expiration of the eight days on which such Court may be sitting. (*Ib.* r. 24.) From the Divisional Court there is an appeal to the Court of Appeal, and an order under Ord. XIV. being interlocutory the appeal must be within twenty-one days. (Ord. LVIII. r. 15; *Standard Discount Co. v. La Grange*, 3 C. P. D. 67; *Salaman v. Warner*, 60 L. J., Q. B. 624.) The Court of Appeal will not readily interfere with the discretion of the Divisional Court where leave to defend has been given. (*Papayanni v. Coutpas*, W. N. (1880) 109; *Edwards v. Davis*, W. N. (1888) 59.)

Pending the application the time for delivering a defence does not run.

Order for judgment.

An order for judgment (R. S. C. 1883, App. K. No. 6) being made, may be enforced by a writ of possession. (Ord. XLII. r. 5; Ord. XLVII.)

Order giving leave to defend.

If leave to defend be given, it may be upon terms as to time and mode of trial (Ord. XIV. r. 6), and the Court or judge may, by consent, dispose of the action summarily. (Rule 7.) The order usually fixes the time within which the defence is to be delivered, and if no time be fixed it must be within eight days. (Ord. XXI. r. 8.) From that point the action proceeds in the ordinary course like any other action.

(b) *By Writ with a General Indorsement.*

Indorsement on writ.

If the case be one to which the use of a special indorsement is inapplicable, or the plaintiff in the exercise of his option prefers not to use it, the action is commenced by a writ with a general indorsement. This must be a plain statement of the plaintiff's claim: *e.g.*, "The plaintiff's claim is to recover possession of a house No. 20, Fleet Street," or "of a farm called Blackacre, situate in the parish of Churt, in the county of Surrey;" but the indorsement need not be perfectly definite and precise (Ord. III. r. 2), since the plaintiff may by leave amend his indorsement under Ord. XXVIII. r. 1, and may, by his statement of claim, alter, modify, or extend his claim without any amendment of the indorsement of the writ. (Ord. XX. r. 4.)

Joinder of other claims with ejectment.

No cause of action shall, unless by leave of the Court or a judge, be joined with an action for the recovery of land,

except claims in respect of mesne profits or arrears of rent or double value in respect of the premises claimed or any part thereof, and damages for breach of any contract under which the same or any part thereof are held, or for any wrong or injury to the premises claimed. (Ord. XVIII. r. 2.) The rule does not apply to an action for foreclosure or redemption, with an added claim for possession of the mortgaged premises. (*Ib.*)

Leave should be obtained before the issue of the writ (*Pilcher v. Hinds*, 11 Ch. D. 905; 48 L. J., Ch. 587; *Sutcliffe v. Wood*, 50 L. T. 705), but may be granted after (*Rusbrooke v. Farley*, 33 W. R. 557; 52 L. T. 572; and see *Mulckern v. Doerks*, 53 L. J., Q. B. 526); and a defendant who desires to take the objection that the rule has not been complied with should do so at once. (*Re Derbon*, 36 W. R. 667.) The application is by summons in chambers.

No leave is needed to join a claim for relief which is not a distinct cause of action, but is merely ancillary to the claim for possession of the land, such as a claim for a receiver (*Allen v. Kennet*, 24 W. R. 845), for an injunction to prevent the defendant interfering with the plaintiff's quiet possession (*Kendrick v. Roberts*, 30 W. R. 365), or permitting a nuisance contrary to the terms of the lease (*Read v. Wotton* [1893], 2 Ch. 171; but see *Hambling v. Wallani*, W. N. (1889) p. 133), or for a declaration that the lease under which the defendant holds was entered into under a common mistake. (*Gledhill v. Hunter*, 49 L. J., Ch. 333; 14 Ch. D. 492.)

Leave where necessary will be given when the causes of action, though distinct, are connected with the claim to possession. Thus, leave was given to join a claim to recover a deed relating to the land and the recovery of personal property comprised in the same instrument with the land (*Cook v. Enchmarch*, 2 Ch. D. 111; 45 L. J., Ch. 504), for administration of the estate, part of which was sought to be recovered (*Kitching v. Kitching*, 24 W. R. 901), and for an assault and trespass committed in effecting an entry upon the premises. (*Dennis v. Crompton*, W. N. (1882) 121.)

The rule applies to counter-claims as well as claims. (*Compton v. Preston*, 21 Ch. D. 138; *Clark v. Wray*, 31 Ch. D. 68; 55 L. J., Ch. 119.)

The writ must be directed to the persons in possession Parties. (that is, actual possession of the premises) by name. But

a mere servant, not occupying in such a character as that he may be presumed to be a tenant, need not be made a defendant. (*Doe d. James v. Stanton*, 2 B. & Ald. 371; 1 Chitt. 118.) Tenants in common may issue a joint writ to recover the property to which they are entitled. (*Elliss v. Elliss*, 27 L. J., Q. B. 316.) The christian name and surname of each person in possession of all or any part of the property claimed in the writ, whether as tenant or under-tenant, should be correctly stated (*Doe d. Smith v. Roe*, 5 Dowl. 254; *Doe d. Williamson v. Roe*, 10 Moore, 493; *Doe v. Cock*, 4 B. & C. 259; *Doe v. Gee*, 9 Dowl. 612); but provided the writ is served on the persons in actual possession, an absolutely correct statement of the names will be unimportant (*Doe d. Frost v. Roe*, 3 Dowl. 563), as where the tenant is called *Jacob* instead of *Sarah* (*Doe d. Foulkes v. Roe*, 2 Dowl. 567), or the christian name is omitted (*Doe d. Warne v. Roe*, 2 Dowl. 517), for the Court will not set aside the writ or the copy and service for a mere misnomer. (*Doe d. Stainton v. Roe*, 6 M. & S. 203; *Wells v. Suffield*, 4 C. B. 750.) Titled persons should be designated by their titles. (*Lapiere v. Germain*, 2 Lord Raym. 859; *Wells v. Suffield*, *supra*.)

Trustees of bankrupts, executors and administrators.

Church-wardens and overseers.

Corporations.

Trustees of bankrupts, executors and administrators need not be so described in the writ (Cole, Eject. 94); but it is otherwise with churchwardens and overseers, who must be so named and described. (*Doe d. Llandesilio v. Roe*, 4 Dowl. 222; *Ward v. Clarke*, 12 M. & W. 747.)

Corporations aggregate should be described by their corporate name (*Doe v. Miller*, 1 B. & Ald. 699; *Woolf v. City Steamboat Co.*, 7 C. B. 103), and corporations sole by their christian and corporate name. (Ad. Eject. 169.)

Service of writ.

No service of the writ is required where the defendant by his solicitor agrees to accept service and enters an appearance (Ord. IX. r. 1); in other cases the service of the writ must, wherever practicable, be personal (Ord. IX. r. 2); but a judge may order substituted or other service, or the substitution of notice, by advertisement or otherwise, for service, if from any cause the plaintiff is unable to effect prompt personal service. (*Ib.*) For various cases in which substituted service has been allowed, see *Cook v. Dey*, 2 Ch. D. 218; 45 L. J., Ch. 611; *Crane v. Jullion*, 2 Ch. D. 220; 24 W. R. 691; *Capes v. Brewer*, 24 W. R. 40; *Rafael v. Ongley*, 34 L. T. 124; *Dymond v. Croft*, 45 L. J., Ch. 604; 3 Ch. D. 512; *Whiteley v. Honeywell*, 24

W. R. 851; *Coulburn v. Carshaw*, 32 W. R. 33; Chitty, Forms, 87, 12th ed. The service may be effected at any hour before midnight on last day (*Doe d. Kenrick v. Roe*, 5 D. & L. 578), but not on Sunday (29 Car. 2, c. 7, s. 6); and must be on the person or persons in *actual* possession to whom the writ is directed, as on the sub-tenant where the premises have been sub-let. (*Doe v. Cock*, 4 B. & C. 259. As to what constitutes "actual" as distinguished from "vacant" possession, see *post*, p. 483.) A person not named as a defendant may, even after judgment, obtain leave to appear and defend upon showing by affidavit that he is in possession by himself or his tenant. (Ord. XII. r. 25. See *Minet v. Johnson*, 34 Sol. Jour. 637; 63 L. T. 507.)

When it may
be effected;

on whom.

Personal service is effected by tendering a copy of the writ to the defendant, and producing the original if required. (See *Phillipson v. Emmanuel*, 56 L. T. 858.)

How effected.

Where the action is against husband and wife, both must be served unless the Court or a judge otherwise order. (Ord. IX. r. 3.)

Service upon
particular
defendants.

Husband and
wife.

When an infant is defendant, service on his or her father or guardian (see *White v. Duvernay*, 60 L. J. Prob. 89), or, if none, then upon the person with whom he or she resides, will be good, unless otherwise ordered. (Ord. IX. r. 4.)

Infants.

When the defendant is a lunatic or person of unsound mind, service on the committee of the lunatic or on the person with whom the person of unsound mind resides, or under whose care he or she is, will, unless the Court or a judge otherwise orders, be deemed good service. (Ord. IX. r. 5.)

Lunatics or
persons of
unsound
mind.

Where persons carrying on business as partners within the jurisdiction are sued in the name of their firm, the writ must be served either upon any one or more of the partners, or, at the firm's principal place of business within the jurisdiction, upon any person having the control or management of the partnership business there. (Ord. XLVIII. a, r. 3.) Unless at the time of service notice is given to the person served that he is served as a person having the control or management of the business, he will be deemed to be served as a partner. (Ord. XLVIII. a, r. 4.) Such service will be deemed good service on the firm whether any of the members are out of the jurisdiction or not.

Partners.

(Ord. XLVIII. a, r. 4.) The partners only need appear. (*Ib.* r. 6.) They must appear individually. (*Ib.* r. 5.)

Upon corporations, &c.

Subject to any statutory provision providing for service, a writ against a corporation may be served on the mayor or other head officer, or on the town clerk, clerk, treasurer, or secretary of such corporation; and where by any statute provision is made for service of any writ of summons or other process upon any corporation or other body or number of persons, the writ must be served in manner so provided. (Ord IX. r. 8.)

The mode of service of writs, legal notices and proceedings upon public companies, commissioners, &c. is generally defined by the public or private statutes regulating them. Thus the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 135, provides that service on the secretary shall be sufficient. (See *Wilson v. Caledonian Rail. Co.*, 5 Ex. 822, and *Thompson v. N. B. Rail. Co.*, 42 L. T. 95.) So the 7 Will. 4 & 1 Vict. c. 73, s. 26, provides, as to chartered companies incorporated thereunder, for service on the clerk, *i.e.*, chief clerk, &c. (*Walton v. Universal Salvage Co.*, 16 M. & W. 438.) The 7 & 8 Vict. c. 110; The Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 138; Commissioners Clauses Act, 1847 (10 Vict. c. 16), s. 99; Companies Act, 1862 (25 & 26 Vict. c. 89), s. 62, and the various Acts incorporating the different companies, &c., must be consulted on this subject as occasion arises, together with the cases of *Pilbrow v. Pilbrow's Atmospheric, &c. Co.*, 3 C. B. 730; *Towne v. London and Limerick Steamship Co.*, 5 C. B., N. S. 730; and as to foreign companies, *Ingate v. Lloyd*, 4 C. B., N. S. 704; *Newby v. Van Oppen*, L. R., 7 Q. B. 293.

Charitable institutions.

Service on the matron on the premises and on the secretary, coupled with an acknowledgment by the solicitor of a charitable institution, was held good. (*Doe d. Fishmongers' Co. v. Roe*, 2 Dowl., N. S. 689.)

Chapels.

Service on the minister and a trustee (*Doe d. Smith, Bart. v. Roe*, 8 Dowl. 509), on the surviving lessees, and a sextoness (*Doe d. Kirschner v. Roe*, 7 Dowl. 97), has been held good in ejectment for a chapel. (See also *Doe d. Somers v. Roe*, 8 Dowl. 292; *Doe d. Dickens v. Roe*, 7 Dowl. 121.)

Where land or messuage is vacant.

In cases of vacant possession, when it cannot otherwise be effected, service of the writ may be made by posting a

copy of the writ on the door of the dwelling-house, or other conspicuous part of the property. (Ord. IX. r. 9.)

What constitutes "vacant possession" may occasionally be a question of practical difficulty; for there may be a legal or constructive possession without actual occupation, as during the tenant's absence (*Doe d. Johnson v. Roe*, 12 L. J., Q. B. 97), or where the tenant has left beer in the cellar, or hay in a barn. (*Savage v. Dent*, 2 Str. 1064.) But if the tenant has locked up and quitted the house (*Doe v. Cock*, 4 B. & C. 259), or the house has been pulled down (*Doe d. Norman v. Roe*, 2 Dowl. 399, 428), or is unfinished and untenanted with no property in it (*Doe d. Schovell v. Roe*, 3 Dowl. 691), the claimant may proceed as on a vacant possession; but it must clearly appear that there is no tenant in possession (*Doe d. Burrows v. Roe*, 7 Dowl. 326), for if *some* only of the houses included in the lease are vacant, the claimant cannot so proceed. (*Doe d. Timothy v. Roe*, 8 Scott, 126.) In all such cases, as far as possible, copies of the writ should be served on the parties interested and posted up on the premises (*Doe d. Chippindale v. Roe*, 7 C. B. 125), and service of a writ addressed "to the assignees and personal representatives of A. B., deceased," by posting copies on the door, was held good. (*Harrington v. Bytham*, 2 C. L. R. 1033.)

What constitutes vacant possession.

Service out of the jurisdiction may be allowed by the Court or a judge, whenever the whole subject-matter of the action is land situate within the jurisdiction (with or without rents or profits) (Ord. XI. r. 1 (a)), upon application for the order, supported by evidence showing where the defendant may probably be found, and the ground upon which the application is made. (*Ib.* r. 4.) The order giving leave must limit a time for appearance. (*Ib.* r. 5.)

Service out of the jurisdiction.

The time limited for appearance to an ordinary writ is eight days, but a defendant may appear at any time before judgment. (Ord. XII. r. 22.)

When defendant is to appear.

In order to afford the landlord a reasonable opportunity of himself appearing and defending the possession of property in the occupation of his tenants, in cases where the claim is inconsistent with his own title, and in order to avoid successful collusion between the claimant and the tenant in possession, it was enacted, by the Common Law Procedure Act, 1852, s. 209 (re-enacting 11 Geo. 2, c. 19, s. 12), that every tenant to whom any writ in eject-

Tenant, on being served with writ, must give notice to his landlord.

ment shall be delivered, or to whose knowledge it shall come, shall *forthwith* (i. e., with all reasonable celerity, *per* Tindal, C. J., in *Burgess v. Boetefeur*, 7 M. & Gr. 494) give notice thereof to his landlord, or to his bailiff or receiver, under penalty of forfeiting the value of three years' improved or rack rent of the premises demised or holden in the possession of such tenant to the person of whom he holds, to be recovered by action in any Court of common law having jurisdiction for the amount.

Sect. 209 is remedial to the landlord rather than penal to the tenant.

Under this section, which, it must be remembered, is remedial to the landlord rather than penal to the tenant, the Court will set aside a regular judgment, and admit the landlord to defend, if the tenant has not given him notice (*Doe d. Troughton v. Roe*, 4 Burr. 1996; *Doe d. Meyrick v. Roe*, 2 Cr. & J. 682; and see *Dobbs v. Passer*, 2 Str. 975); but not after execution executed, unless in the case of inadvertence (*Doe d. Mullarky v. Roe*, 11 A. & E. 333; *Doe d. Butler v. Roe*, 2 Har. & W. 130), or of collusion between the claimant and the tenant (*Doe d. Thomson v. Roe*, 4 Dowl. 115; *Goodtitle v. Badtitle*, 4 Taunt. 820), which if proved will always insure the interference of the Court. (*Doe d. Grocers' Co. v. Roe*, 5 Taunt. 205.)

A tenant to a mortgagor who does not give him notice of an ejectment brought by the mortgagee to enforce an attornment is not liable to the penalties. (*Buckley v. Buckley*, 1 T. R. 647.)

Right of landlord to appear and defend.

R. S. C. 1883, Ord. XII. rr. 25, 26.

Appearance by persons not named in the writ.

This section having insured the landlord's obtaining immediate information from the tenant, he was enabled by sect. 172, Common Law Procedure Act, 1852 (re-enacting 11 Geo. 2, c. 19, s. 13), to intervene and defend. This right is preserved by Ord. XII. r. 25, which provides that any person not named as a defendant in the writ may, by leave of the Court or a judge, appear and defend, on filing an affidavit showing that he is in possession of the land either by himself or his tenant.

Under the Act of George II. the word "landlord," which was there used, was construed to extend to any person claiming title consistent with the possession of the occupier, whether he had actually received any rent or not. (*Lovelock v. Dancaster*, 4 T. R. 122.) Thus a mortgagee out of possession (*Doe v. Cooper*, 8 T. R. 645), able to show that he has a *bonâ fide* interest in the result (*Doe d. Pearson v. Roe*, 6 Bing. 613), or an heir who has never been in possession (*Doe d. Heblethwaite v. Roe*, 3 T. R. 783 (n), or

a remainderman claiming under the same title (*Lovelock v. Dancaſter*, 3 T. R. 783; but ſee *Whitworth v. Humphries*, 5 H. & N. 185), or a deviſee in truſt (*Lovelock v. Dancaſter*, 4 T. R. 122), or a ſub-leſſee of three private boxes in a theatre, to the extent of his intereſt (*Croft v. Lumley*, 4 E. & B. 608), may be admitted to defend as landlord.

But a perſon who has recovered judgment in ejection upon a forfeiture of a leaſe, but has not actually obtained poſſeſſion (*Thompson v. Tomkinſon*, 11 Exch. 442), or a third perſon claiming adverſely (*Doe d. Horton v. Rhys*, 2 Y. & J. 88), will not be permitted to defend as landlord. “Where a perſon claims in oppoſition to the title of the tenant in poſſeſſion, he can in no light be conſidered as landlord, and it would be unjuſt to the tenant to make him a co-defendant—their defences might claſh.” (*Per Lord Mansfield, Fairclaim v. Shamtitle*, 3 Burr. 1295; and ſee *Driver v. Laurence*, 2 W. Bl. 1259.) Nor will two perſons, claiming ſeparately as landlords of the ſame tenant for the ſame land (*Doe d. Lloyd v. Roe*, 15 M. & W. 431), be permitted to defend as landlords, though one perſon as landlord for the whole, and another, as aſſignee of an underleaſe, as landlord for part, of the premises may be (*Cheſter v. Wortley*, 17 C. B. 410); and the Courts will not ſet aſide a judgment and execution in order to let in a perſon to defend, though he make an affidavit ſetting forth a clear title and offer to pay coſts. (*Doe d. Ledger v. Roe*, 3 Taunt. 506.)

The application to be permitted to defend as landlord ſhould be made as ſoon as the perſon has notice of the writ, ſo that an appearance may be entered within the eight days allowed for doing ſo, and the affidavit in ſupport muſt at leaſt ſhow a *primâ facie* caſe of poſſeſſion by the applicant or his tenant. (*Croft v. Lumley*, 24 L. J., Q. B. 78.)

When application for permission to defend ſhould be made.

Upon complying with the requirements of this rule, the landlord is entitled as a matter of right to be let in to defend, and the Court or judge has no power, in the caſe of a landlord reſiding out of the juriſdiction, to impoſe upon him the condition of finding ſecurity for coſts. (*Butler v. Meredith*, 24 L. J., Ex. 239.)

Any perſon appearing to defend an action for the recovery of land as landlord, in reſpect of property whereof he is in poſſeſſion only by his tenant, muſt ſtate in his appearance that he appears as landlord. (Ord. XII. r. 26.)

Persons appearing as landlords.

Stay of proceedings against tenants.

Under the Judicature Act, 1873 (36 & 37 Vict. c. 66, s. 24, sub-s. 5), the Courts are not disabled from directing a stay of proceedings in any cause pending before them, and will in cases of emergency restrain actions against tenants subsidiary to an action of ejectment, as where the landlord appears and defends for the whole of the land. The application to stay must be by motion in a summary way, but it does not very clearly appear whether it may be made *ex parte*, or whether, as is the case in proceedings under sect. 25, sub-sect. 8, the opposite party must be served with notice. (*Blewitt v. Dowling*, Bitt. 17.)

Where person not named in writ has obtained leave to appear.

Where a person not named as defendant in the writ has obtained leave of the Court or judge to appear and defend, he must enter an appearance according to the ordinary manner intituled in the action against the party named in the writ as defendant, and shall forthwith give notice of such appearance to the plaintiff's solicitor, or to the plaintiff if he sues in person, and shall in all subsequent proceedings be named as a party defendant to the action. (Ord. XII. r. 27.)

A defendant may limit his defence to part only.

Any person appearing to the writ shall be at liberty to limit his defence to a part only of the property mentioned in the writ, describing that part with reasonable certainty in his memorandum of appearance, or in a notice intituled in the action [for form of notice, see No. 3 in Part II. of Appendix (A.) to the R. S. C. 1883], and signed by him or his solicitor, such notice to be served within four days after appearance; and an appearance where the defence is not so limited shall be deemed an appearance to defend for the whole. (Ord. XII. rr. 28, 29.)

A defendant for part only should not describe it as "freehold" or "copyhold," unless it be so described in the writ. (*Doe v. Jones*, 1 Camp. 367.) "A right to enter and perform divine service" is not sufficient to entitle a parson to defend for a chapel, &c. (*Martin v. Davis*, 2 Str. 914.)

Defendant's liability for costs.

Each of several defendants who appear will be (in the event of a general verdict for the plaintiff) liable to pay the whole of the plaintiff's costs, unless he confess the plaintiff's title. (*Johnson v. Mills*, L. R., 3 C. P. 22; *Stumm v. Dixon*, 22 Q. B. D. at p. 535.) Where one of two defendants to an action for the recovery of land, who had defended separately applied to withdraw his defence, he was allowed to do so upon payment of the plaintiff's costs so far as they were occasioned by his defence. (*Real*

and Personal Advance Co. v. McCarthy, 14 Ch. D. 188; 18 Ch. D. 362; 28 W. R. 418; 30 W. R. 481.)

If a servant, bailiff, or person not claiming any right or title be served with a writ, he should not appear, but suffer judgment by default; otherwise he will be personally liable, and the fact of his being only a servant will not be any defence. (*Doe v. Stradling*, 2 Stark. 187; *Doe v. Stanton*, 2 B. & Ald. 371; 1 Chitt. 118.) He should, however, hand the copy writ to his employer, leaving him to obtain leave to appear and defend either as tenant in possession or as landlord, or to act as he may be advised. If judgment be signed against the servant in default of appearance, he will not be liable for costs, which would only be payable as damages in a subsequent action for mesne profits, and the judgment by default is then no evidence of his ever having been in possession. (*Doe v. Stanton*, 2 B. & Ald. 373, *per* Bayley, J.)

When defendants need not appear.

If any defendant fail to appear to the writ, the plaintiff must, before proceeding upon default of appearance, file an affidavit of service, or of notice in lieu of service, as the case may be. (Ord. XIII. r. 2.)

Proceeding upon default of appearance,—
affidavit of service.

In case no appearance be entered in an action for the recovery of land within the time limited for appearance, or if an appearance be entered but the defence be limited to part only, the plaintiff is at liberty to enter a judgment that the person whose title is asserted in the writ shall recover possession of the land, or of the part thereof to which the defence does not apply. (*Ib.* r. 8; but see *Minet v. Johnson*, *ante*, p. 481.)

Where no appearance entered, plaintiff may enter judgment.

Where the defendant fails to appear to the writ of summons, and the plaintiff has indorsed a claim for mesne profits, arrears of rent, double value, or damages for breach of contract, or wrong or injury to the premises claimed, though he may enter judgment for the *land*, as above stated (*ib.* r. 9), he must proceed somewhat differently as to such other claims. (1) Where the claim is for a debt or liquidated demand only, he may enter final judgment for any sum not exceeding the sum indorsed upon the writ, with interest and costs. (Ord. XIII. r. 3.) (2) Where the plaintiff's claim is for pecuniary damages, interlocutory judgment may be entered and a writ of inquiry issued to assess the damages, but instead of a writ of inquiry the damages may be ascertained in any other way which the Court or a judge may direct. (*Ib.* r. 5.)

Where plaintiff has indorsed a claim for mesne profits, &c.

Setting aside judgment.

The Court or a judge may set aside or vary a judgment by default of appearance upon such terms as may be just. (Ord. XIII. r. 10.)

Statement of claim, when to be delivered.

No statement of claim *may* be delivered where the writ is specially indorsed (Ord. XX. r. 1 (a)), and in other cases none *need* be delivered except in certain cases of default of appearance (not applicable to ejectment), or unless the defendant gives notice on entering appearance, or within eight days thereafter, that he requires a statement of claim to be delivered (*ib.* r. 1 (b)), in which case it must, unless otherwise ordered, be delivered within five weeks from the time of plaintiff receiving notice (*ib.* r. 1 (c), Ord. XIX. r. 2), and the plaintiff may voluntarily deliver a statement, though not required by the defendant, at any time within six weeks after appearance (Ord. XX. r. 1 (d)), but a plaintiff who unnecessarily delivers a statement of claim, or a defendant who unnecessarily requires one, may be mulcted in the costs. (*Ib.* r. 1 (e).) A plaintiff who, being bound to deliver, does not deliver his claim within the time allowed, may have his action dismissed for want of prosecution. (Ord. XXVII. r. 1.)

Pleadings to be brief.

All pleadings shall be as brief as the nature of the case will admit, and the costs of unnecessary prolixity shall be borne by the party chargeable with the same. (Ord. XIX. r. 2.) They shall contain only a statement in a summary form of the material facts (*Philipps v. Philipps*, 4 Q. B. D. 127; 48 L. J., Q. B. 135) upon which the party pleading relies, but not the evidence by which the facts are to be proved (Ord. XIX. r. 4), and such statement may be divided into paragraphs and numbered (*ib.*); dates, sums, and numbers are to be in figures, and not in words (*ib.*), and the forms in the Appendices, when applicable, and when not applicable, forms of a like character, are to be used. (*Ib.* r. 5.) Where the contents of a document are material, but not the precise words, it is sufficient to state the effect briefly. (*Ib.* r. 21.) When an agreement is pleaded, it should be stated whether it is in writing or parol (*Turquand v. Fearon*, 48 L. J., Q. B. 783); but whenever any contract or relation between any persons is to be implied from a series of letters or conversations, or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters or conversations without setting them out in detail. (*Ib.* r. 24.) All pleadings will be

taken to contain an implied averment of the performance or occurrence of all conditions precedent, and any condition precedent the performance or occurrence of which it is intended to be contested must be distinctly pleaded. (*Ib.* r. 14.)

The form of statement of claim given in R. S. C. 1883, App. C., sect. 7, No. 1, should be used when applicable, that is, in the case of a tenant whose term has expired by effluxion of time or by notice. In other cases it must contain with like brevity a statement of the material facts upon which the plaintiff relies. The particulars to be stated will depend upon the facts of each particular case. (*Philipps v. Philipps*, 48 L. J., Q. B. 135; 4 Q. B. D. 127.) Thus, if the plaintiff is an assignee of the reversion, the nature and effect of the documents under which he claims should be stated (*ib.*; but see *Musgrave v. Walsh*, 6 L. R., Ir. 335); if the plaintiff claims as heir-at-law, he should give the links of relationship upon which he relies (*Palmer v. Palmer*, [1892] 1 Q. B. 319; but see *Evelyn v. Evelyn*, 28 W. R. 531), and where he seeks to escape from the Statute of Limitations on the ground of concealed fraud, he should state his case with extreme particularity. (*Riddell v. Strathmore*, 31 Sol. Jour. 183.) Formerly the venue in ejectment being local had to be laid in the county where the lands were situate, and if at the trial the premises were found to be in a different county the claimant was liable to be non-suited. Now, however, local venues are abolished. The statement of claim must name the place of trial when intended to be elsewhere than Middlesex, and unless ordered to the contrary it shall be in the county or place so named; where no place of trial is named the trial shall be in Middlesex, unless otherwise ordered. (Ord. XXXVI. r. 1; and see Ord. XX. r. 5.)

Statement of claim, form of.

Venue in ejectment formerly local, now transitory.

It is sometimes essential for one of the parties to obtain from the other disclosure of material facts or documents within his knowledge or possession, necessary for the support of the first party's case. This is done by the administration of interrogatories, to be answered on oath, or by an order for discovery of documents. A plaintiff or defendant can deliver interrogatories *as of right* only in actions where relief is claimed on the ground of fraud or breach of trust. In every other cause the plaintiff or defendant may, by leave of the Court or a judge, deliver interrogatories in writing for the examination of the

Discovery by interrogatories.

opposite parties, or any one or more of such parties. (Ord. XXXI. r. 1) There is the same right to discovery in an action of ejectment as in any other action. (*Lyell v. Kennedy*, 8 App. Cas. 217; 52 L. J., Ch. 385.) The object of interrogatories is to obtain admissions from the opponent of matters relevant to the issue, and the onus of proving which lies upon the interrogating party (*ib.*; *Att.-Gen. v. Gaskill*, 20 Ch. D. 519; 51 L. J., Ch. 660; 46 L. T. 180); the cardinal rules recognized being, first, that it is the right of every party to have discovery of the evidence which relates to his case, and, secondly, that it is the privilege of the interrogated party to withhold discovery of the evidence which exclusively relates to his own. (*Lyell v. Kennedy*, *supra*.) But a party cannot obtain, by interrogatories, any information which, before the Judicature Acts, he could not have obtained by a bill of discovery in the Court of Chancery. (*Att.-Gen. v. Gaskill*, *supra*; *Atherley v. Harvey*, 2 Q. B. D. 524; 46 L. J., Q. B. 518; *Anderson v. Bank of British Columbia*, 2 Ch. D. 644; 45 L. J., Ch. 449.) Therefore, in an action of ejectment by a landlord for forfeiture, the landlord is not entitled to interrogate the defendant to show that he had incurred a forfeiture of his lease. (*Pye v. Butterfield*, 34 L. J., Q. B. 17; 5 B. & S. 829; Bray on Discovery, 346.) On the other hand, having regard to the old Chancery practice, a plea that the defendant is a purchaser for valuable consideration without notice, will not exempt him from the obligation to make discovery. (*Ind Coope v. Emmerson*, 12 App. Cas. 300.) A defendant withholding the premises after expiration of his lease will not be allowed to interrogate the plaintiff with a view to show that his title has expired. (*Wallen v. Forrest*, L. R., 7 Q. B. 239.)

It seems, however, settled that a plaintiff may interrogate the defendant as to whether he is or is not the real defendant (*Sketchley v. Conolly*, 11 W. R. 573), and the defendant may, by interrogating the plaintiff, seek to discover the character in which he claims, and the pedigree upon which he relies (*Flitcroft v. Fletcher*, 25 L. J., Ex. 94), provided he can show that he is wholly unacquainted with the plaintiff's title. (*Stoate v. Rew*, 32 L. J., C. P. 160; *Pearson v. Turner*, 33 L. J., C. P. 224; *Blyth v. L'Estrange*, 3 F. & F. 154; see also *Ingilby v. Shafto*, 33 Beav. 31.) Where a defendant pleads that he is in possession by himself or his tenants, he may be interrogated as to the

names of the tenants and the dates, but not the nature, of the tenancies. (*Eyre v. Rodgers*, 40 W. R. 137.) Generally a party is entitled to discovery of the facts necessary to support his opponent's case, but not of the evidence by which it is to be proved. (*Eade v. Jacobs*, 47 L. J., Ex. 74; 3 Ex. D. 335; but see *Marriott v. Chamberlain*, 55 L. J., Q. B. 448; 17 Q. B. D. 154.)

In no case may parties take advantage of the provisions of the Judicature Acts for the purpose of increasing costs, and the practice of delivering interrogatories before the statement of defence has been delivered (unless justified by special circumstances), though admissible under Ord. XXXI. r. 1, will not be allowed in the Common Law Divisions, unless good cause be shown for their allowance at so early a stage (*Mercier v. Cotton*, 1 Q. B. D. 442; *Disney v. Longbourne*, 2 Ch. D. 704; 45 L. J., Ch. 32; *Harbord v. Monk*, 9 Ch. D. 616; 27 W. R. 164; *Beal v. Pilling*, 38 L. T. 486); whilst the costs occasioned by all interrogatories exhibited unreasonably, vexatiously, or at improper length, will have to be borne by the party in fault. (*Ib.* r. 2.)

Time when interrogatories should be administered.

Interrogatories exhibited unreasonably may be set aside, or prolix, oppressive, unnecessary or scandalous interrogatories may be struck out. (Ord. XXXI. r. 7; *Oppenheim v. Sheffield*, 62 L. J., Q. B. 167; [1893] 1 Q. B. 5.)

Any party may, without filing any affidavit, apply to the Court or a judge for an order directing any other party to the cause or matter to make discovery on oath of the documents which are or *have been* in his possession or power relating to any matter in question in the action (Ord. XXXI. r. 12, and see *New Brit. Mut. Inv. Co. v. Peed*, 3 C. P. D. 196; 26 W. R. 354); and the Court or a judge may at any time during the pendency of any cause or matter order the production by any party thereto on oath of such of the documents in his possession or power relating to any matter in question in such action or proceeding, as the Court or judge shall think right; and the Court may deal with such documents when produced in such manner as shall appear just. (*Ib.* r. 14.) It has been said that a plaintiff is not entitled to discovery until he has delivered his claim (*Cashin v. Cradock*, 2 Ch. D. 140; 34 L. T. 52); nor a defendant until he has delivered his statement of defence (*ib.*); but there is no absolute rule against it when cause is shown for an earlier applica-

Discovery of documents.

tion. (*Republic of Costa Rica v. Strousberg*, 40 L. T. 401; 11 Ch. D. 323.)

A defendant in possession may be compelled to make an affidavit of his documents of title, although he may have a right to object to produce them. (*New Brit. Mut. Inv. Co. v. Peed*, 3 C. P. D. 196; 26 W. R. 354; *Wrentmore v. Hagley*, 46 L. T. 741; but see *Philipps v. Philipps*, 4 Q. B. D. 127; 40 L. T. 815.)

The general rule is that the party is bound to produce all documents in his possession material to the case of his opponent. A lessor was held entitled in an ejectment action to inspection of a lease where he had no counterpart (*Doe v. Langford*, 21 L. J., Q. B. 217), and, in an action for rent, to inspection of an indorsement on the lease relating to an increase of the rent. (*Mayor of Arundel v. Holmes*, 8 Dow, 118.) So the lessee is entitled to inspection of the lease in an action for rent (*King v. King*, 4 Taunt. 666), or in an ejectment for breach of covenant (*Doe d. Child v. Roe*, 1 E. & B. 279; 22 L. J., Q. B. 102); even in an action against his landlord upon an agreement which is in the hands of the latter. (*Reid v. Coleman*, 2 Dow, 354.)

The party against whom the order for discovery is made must specify in his affidavit which, if any, of the documents mentioned in the order he objects to produce. (Ord. XXXI. r. 13.) The affidavit is in general to be taken to be true and conclusive. (*Welsh Steam Collieries v. Gaskell*, 36 L. T. 352; *Johnson v. Smith*, 25 W. R. 539; *Bewicke v. Graham*, 7 Q. B. D. 400; 50 L. J., Q. B. 396.) The party making it cannot be interrogated as to it, nor will a contentious affidavit by the opposite party be admitted to contradict it. (*Morris v. Edwards*, 60 L. J., Q. B. 292; 15 App. Cas. 309.)

Inspection of documents referred to in pleadings.

Every party to a cause or matter may, at any time, give notice in writing to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice or of his solicitor, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards put such document in evidence on his behalf, unless he satisfy the Court that it relates only to his own title, he being a defendant, or that he had some sufficient cause for not complying with such notice. (Ord. XXXI. r. 15.)

The right of inspection given by this rule is quite distinct from that given by Ord. XXXI. r. 14. No order is necessary, and there is no necessity for the defendant to deliver his defence before giving notice with regard to documents disclosed in the statement of claim. (*Quilter v. Heatley*, 23 Ch. D. 42; 31 W. R. 331. See *Roberts v. Oppenheim*, 26 Ch. D. 724.)

When the plaintiff has delivered his statement of claim, the defendant is bound (unless the time is enlarged by the Court or a judge) to deliver his defence within ten days from the delivery of the claim or from the time limited for appearance, whichever is last. (Ord. XIX. r. 2; Ord. XXI. r. 6.) Service of a writ specially indorsed is equivalent to delivery of a statement of claim for the purpose of this rule. (*Anlaby v. Prætorius*, 57 L. J., Q. B. 287; 20 Q. B. D. 764.) Where no statement of claim is required and none delivered, the defence must be delivered within ten days after appearance (Ord. XXI. r. 7), and where leave to defend is given under Ord. XIV., the writ being specially indorsed, within the time (if any) limited by the order, and if no limit, within eight days from the order. (Ord. XXI. r. 8.)

Statement of
defence.

If the defendant make default in delivering a defence, the plaintiff may enter judgment that the person whose title is asserted in the writ of summons shall recover possession of the land with his costs. (Ord. XXVII. r. 7.) Where there is also a claim for mesne profits, arrears of rent, or double value in respect of the premises, or any part of them, or damages for breach of contract, or wrong or injury to the premises claimed, and the defendant makes default, or if, being more than one defendant, some or one of them make default in delivering a defence, the plaintiff may enter judgment against the defaulting defendant or defendants (*ib.* r. 8), and proceed with his action against the others. A writ of inquiry will then issue to assess the damages (if any), unless the Court or a judge order them to be ascertained in another way (*ib.* r. 4); or, in the case of several defendants, the damages against him or those in default must be assessed at the trial, unless the Court or a judge shall otherwise direct. (*Ib.* r. 5.)

Default in
delivering
defence.

The general observations made (*ante*, p. 488) as to the rules governing the contents of pleadings must be borne in mind in settling a defence.

Contents of
statement of
defence.

The rules under the Judicature Acts have to a great

Plea of
possession.

extent abolished general pleas. There is one very important exception in the case of actions for the recovery of land. A defendant who is in possession by himself or his tenant (see *Eyre v. Rodgers*, ante, p. 491) need not plead his title unless his defence depends on an equitable estate or right, or he claims relief upon any equitable ground against any right or title asserted by the plaintiff. But, except in such case, it is sufficient for him to state by way of defence that he is so in possession, and it shall be taken to be implied in such statement that he denies or does not admit the allegations of fact contained in the plaintiff's statement of claim. He may, nevertheless, rely upon any ground of defence he can prove, except as before mentioned. (Ord. XXI. r. 21.)

It will generally be found prudent, in all defences to actions for the recovery of land, to plead possession. This will enable the defendant to raise such defences as a denial of an allegation of notice to quit or a legal defence under the Statute of Limitations. (*Danford v. McAnulty*, 8 App. Cas. 456.) If, in addition, the defendant relies upon any equitable defence, it must be distinctly raised and pleaded. (Ord. XIX. r. 15.) If, and so far as, the plea of possession is inapplicable, the defence is upon the same footing as a defence in any other action (see *Sutcliffe v. James*, 40 L. T. 875; 27 W. R. 750), and it is not sufficient for the defendant in his defence to deny generally the facts alleged in the claim, but he must deal specifically with each allegation of fact which he does not admit to be true. (Ord. XIX. r. 17.) If he deny any allegation of fact in the claim he must not do so evasively, but must give a fair and substantial answer (*ib.* r. 19); and he will strictly be taken to admit those allegations of fact which he does not, either specifically or by necessary implication, deny. (*Ib.* r. 13.) A defence is not necessarily embarrassing by reason of its alleging several inconsistent defences. (*Owen v. Morgan*, 56 L. J., Ch. 603; 35 Ch. D. 492.)

Counter-
claim.

By an obvious improvement upon the old system, a defendant may now plead a set-off or set up a counter-claim not merely as a defence, but as a claim to any remedy or relief against the plaintiff, thus obviating any necessity for a cross action, and enabling the Court to pronounce final judgment both on the original and cross claim. (Ord. XIX. r. 3.) Although a counter-claim is not a cross action, every proceeding under it is to be

treated as though it were, and the discontinuance of the action does not put an end to the counter-claim. (*McGowan v. Middleton*, 52 L. J., Q. B. 355; 11 Q. B. D. 464.) It is not necessary that the counter-claim should be of the same nature as the original action. (*Beddall v. Maitland*, 17 Ch. D. 174; 50 L. J., Ch. 401.) And the Court or judge may transfer the action from one division to another where advisable; thus, where the counter-claim was for specific performance of an agreement for a lease, the action was transferred to the Chancery Division. (Ord. XLIX. r. 3; *Hillman v. Mayhew*, 1 Ex. D. 132; 45 L. J., Ex. 334; 24 W. R. 435.) But the Court or judge may, on application by the plaintiff before reply, exclude such counter-claim (Ord. XXI. r. 15), and on application before trial refuse permission to defendant to avail himself thereof in cases where the set-off or counter-claim cannot be conveniently disposed of in the pending action (Ord. XIX. r. 3); for example, where the counter-claim may unduly delay the action. (*Gray v. Webb*, 21 Ch. D. 802.) Where a set-off or counter-claim is founded upon separate and distinct facts, the defendant must so state those facts (Ord. XX. r. 7), stating specifically that he relies upon them by way of set-off or counter-claim. (Ord. XXI. r. 10, and see *Hillman v. Mayhew*, 1 Ex. D. 132; 45 L. J., Ex. 334; 24 W. R. 485.)

If any ground of defence arise after action brought, but before defendant has delivered his defence, he may plead the same alone or with his other grounds of defence, and the plaintiff may similarly plead in reply any fresh defence to defendant's set-off or counter-claim arising after defendant has delivered his defence. (Ord. XXIV. r. 1.) Where fresh ground of defence arises after defendant has delivered his defence, he may by leave deliver a further defence within eight days after such defence has arisen, and similar power is given to the plaintiff in the case of a fresh defence to any set-off or counter-claim arising after reply. (*Ib.* r. 2.) Whenever, either in his original or further defence, the defendant alleges a defence arising after action brought, the plaintiff may deliver a confession of such defence, and sign judgment for his costs up to pleading of such defence, unless the Court or judge otherwise order. (*Ib.* r. 3.) Where the defence discloses a good answer in law, such confession is the plaintiff's proper course in preference to discontinuing (*infra*), but it

Matters arising pending the action.

will bar any second action for the same cause. (*Newington v. Levy*, L. R., 5 C. P. 607 ; 6 C. P. 180.)

Discontinu-
ance.

At any time before or after defendant has delivered his defence, before taking any other proceeding (save an interlocutory application) in the action, the plaintiff may by written notice discontinue his action or withdraw any part of his alleged claim, upon paying defendant's costs of the action, or occasioned by the matter so withdrawn ; but his doing so will be no defence to any subsequent action. If any further proceedings have been taken, the plaintiff can neither withdraw the record nor discontinue without leave ; but the Court or judge before, at, or after trial, may order discontinuance or the striking out of any part of the alleged claim upon such terms as may seem fit. So also upon terms, the defendant may, with, but not without, leave, withdraw or have struck out the whole or part of his defence or counterclaim. (Ord. XXVI. r. 1.) The record may be withdrawn by either party by consent (*ib.* r. 2), and the defendant may sign judgment for costs on discontinuance. (*Ib.* r. 3.)

Reply and
subsequent
pleadings (if
any allowed).

The plaintiff must deliver his reply, if any, within twenty-one days after defence delivered (Ord. XXIII. r. 1) ; after which no further pleading other than joinder of issue can be pleaded without leave (*ib.* r. 2), which may be obtained upon terms, and then all subsequent pleadings must be delivered within four days after delivery of previous pleading. (*Ib.* r. 3.) If the plaintiff does not deliver his reply, or either party fails to deliver any subsequent pleading within the period allowed, the pleadings shall at its expiration be deemed closed, and the statements of fact in the pleading last delivered denied and put in issue. (Ord. XXVII. r. 13.)

Close of
pleadings.

Directly either party has joined issue simply, without adding any further or other pleading, or made default as mentioned in Ord. XXVII. r. 13 (*supra*), the pleadings will be deemed closed (Ord. XXIII. r. 5) ; but if it appear to the Court or judge that the issues of fact in dispute are not sufficiently defined, the parties may be directed to prepare issues ; in case of difference to be settled by the Court or judge. (Ord. XXXIII. r. 1.)

Joinder of
issue.

Joinder of issue will operate as a denial of every material allegation of fact in the pleading of the other side, except facts admitted. (Ord. XIX. r. 18.)

Notice of
trial.

The parties being thus fairly at issue, the plaintiff should

give notice of trial. If *he* neglects to give such notice within six weeks after close of pleadings, the defendant may (and will advisably if he have a counterclaim) do so ; or he may apply to the Court or judge to dismiss the action for want of prosecution. (Ord. XXXVI. r. 12.)

Ten days' notice of trial must be given (unless the other party has consented or is under terms or order to take short, *i.e.*, four days', notice). (*Ib.* r. 14.) The notice must be given before entering the action for trial (*ib.* r. 15), and cannot be countermanded except by consent or leave. (*Ib.* r. 19.) It must state whether it is for the trial of the action or of issues therein, and the place and day for which it is to be entered for trial. (*Ib.* rr. 13, 13a.) Notice of trial for London or Middlesex will not be deemed to be for any particular sittings, but for any day after expiration of the notice on which the trial can come on in its order. (*Ib.* r. 17.) If the party giving such notice omit on the day after to enter the action for trial, the other party may do so within four days. (*Ib.* r. 20.) But notice of trial elsewhere than London or Middlesex will be deemed to be for the first day of the next assizes at the place mentioned (*ib.* r. 18), and either party may at any time after notice of trial, and not less than seven days before the commission day, duly enter the action for trial at the next assizes, in the district registry or with the associate. (Ord. XXXVI. r. 22*b*.) The party entering the action must deliver two full copies of the pleadings, one for the use of the judge. (*Ib.* r. 30.)

When the trial is called on, if the plaintiff appears and the defendant does not appear, the plaintiff may prove his claim, so far as the burden of proof lies upon him. (*Ib.* r. 31.) If the plaintiff does not appear, the defendant may have judgment dismissing the action, and prove his counterclaim, if he have one. (*Ib.* r. 32.) Verdict or judgment obtained in default of such appearance may be set aside upon application to the Court or judge within six days (but as to enlarging the time, see *Bradshaw v. Warlow*, 32 Ch. D. 403) after trial, upon terms. (*Ib.* r. 33.)

As to the matters to be proved in support of the plaintiff's claim, see *ante*, p. 471.

Judgment having been obtained that one person recover and another person deliver up possession of the land, upon filing an affidavit showing due service thereof and that it has not been obeyed, the person prosecuting such judgment

may sue out a writ of possession and enforce it in manner heretofore used in actions of ejectment in the superior courts of common law. (Ord. XLII. r. 5; Ord. XLVII. rr. 1, 2.) There may be either one writ for possession and costs, or separate writs at the election of the successful party. (Ord. XLVII. r. 3.)

SECT. 3.—*Action in the County Court for the Recovery of Land.*

Actions of ejectment originally excluded from jurisdiction of county courts, 9 & 10 Vict. c. 95, s. 58;

may now be brought where annual value does not exceed 50l., 51 & 52 Vict. c. 43, s. 59.

Defendant may apply to remove case into Superior Court,

where title to lands of greater annual value involved.

Prior to "The County Courts Act, 1867," actions of ejectment, or in which the title to any corporeal hereditament was in question, were excluded from the cognizance of the county courts (9 & 10 Vict. c. 95, s. 58), except where by agreement the parties consented to give the Court jurisdiction, as they were empowered to do by 19 & 20 Vict. c. 108, s. 23. Litigants, however, rarely agree; the consents were not therefore very numerous, and, with a view to beneficially increasing the jurisdiction of these very useful Courts, they were by the County Courts Act of 1867 given jurisdiction in actions of ejectment, where neither the value of the lands, tenements, or hereditaments, nor the rent payable in respect thereof, exceeded twenty pounds by the year. And now, by the County Courts Act, 1888, which repealed and consolidated and amended the previous County Courts Acts, it is provided that "all actions of ejectment where neither the value of the lands, tenements, or hereditaments, nor the rent payable in respect thereof, shall exceed the sum of fifty pounds by the year, may be brought and prosecuted in the Court of the district in which the lands, tenements, or hereditaments are situate; provided that the defendant in any such action of ejectment, or his landlord, may within one month from the day of service of the summons, apply to a judge of the High Court at chambers for a summons to the plaintiff to show cause why such action should not be tried in the High Court on the ground that the title to lands or hereditaments of greater annual value than fifty pounds would be affected by the decision in such action; and on the hearing of such summons, the judge of the High Court, if satisfied that the title to other lands would be so affected, may order such action to be tried in the High Court, and thereupon all proceedings in the Court in such action shall be discontinued." (51 & 52 Vict. c. 43, s. 59.)

The Act further provides by sect. 60 that "a judge shall have jurisdiction to try any action in which the title to any corporeal or incorporeal hereditaments shall come in question, where neither the value of the lands, tenements, or hereditaments in dispute, nor the rent payable in respect thereof, shall exceed the sum of fifty pounds by the year, or in case of an easement or licence, where neither the value nor reserved rent of the lands, tenements, or hereditaments in respect of which the easement or licence is claimed, or on, through, over, or under which such easement or licence is claimed, shall exceed the sum of fifty pounds by the year."

Courts may also try questions of *title* where neither annual value nor rent exceeds 50*l*.
51 & 52 Vict. c. 43, s. 60.

Actions under sect. 59 of the Act of 1888 are to be distinguished as actions for the *recovery of land*, while those brought under sects. 138 and 139 (*infra*, sect. 4), are to be distinguished as actions for the *recovery of possession*. (C. C. R. 1889, Ord. V. r. 3.) Where an action can be brought under sects. 138 and 139, no action shall be brought under sect. 59.

As the Court is without jurisdiction where either the annual value or rent exceeds the sum of fifty pounds, proof that such is the case is, of course, a complete answer to the action. It is therefore of vital importance that before entering his plaint in the county court the landlord should ascertain that his case is, at least, in that respect one to which the statute applies. This he can do by taking as his criterion of value the rent at which the property might reasonably be expected to let to a tenant from year to year, that being the test adopted for the purpose of rating under the Poor Law Assessment Acts. (*Elston v. Rose*, L. R., 4 Q. B. 4; 38 L. J., Q. B. 6.) If the premises are held subject to a ground rent, the amount thereof is not to be deducted in estimating the annual value. (*Ib.*)

How value determined.

It must, however, be remembered that "rent payable" does not mean a sum which some people are or may be willing to pay for the premises, nor even the rent actually paid by under-lessees, though proof of the amount of such payments would be obviously strong evidence of the real value, but means (where the amounts are different) the rent payable as between the parties to the action. (*Brown v. Cocking*, L. R., 3 Q. B. 672; 37 L. J., Q. B. 250.)

Meaning of "rent payable."

In cases where, notwithstanding that the annual value or rent exceeds fifty pounds, the action is improperly com-

Prohibition in cases where action

brought,
though an-
nual value
exceeds 50/

menced in the county court, the defendant may either (1) consent to the Court having jurisdiction—if he does not consent, the Court must order the action to be struck out (51 & 52 Vict. c. 43, s. 114); or (2) he may raise the objection at the trial; or (3) he may, without waiting for the trial (*Sewell v. Jones*, 19 L. J., Q. B. 372; *Wadsworth v. Queen of Spain*, 20 L. J., Q. B. 488), by application to a judge at chambers founded upon an affidavit disclosing all the material facts, obtain a writ of prohibition. Where, however, there is a substantial ground for the objection, it is generally advisable to raise it at the trial, when, if it be overruled, which can hardly be the case when the objection is *bonâ fide*, or if the judge proceed upon an erroneous mode of calculation, or upon a wrong principle, and assume a jurisdiction he does not really possess, the defendant may either obtain a prohibition before execution issued or appeal to the Court above. Where the judge decides upon conflicting evidence that the value is under 50*l.*, the Court will not review his decision by a prohibition (*Brown v. Cocking, supra*); but a like decision based on an erroneous view of the law will be reviewed on a claim for a writ of prohibition. (*Elston v. Rose, supra*.) The dismissal of a summons for prohibition applied for before trial, on the ground that the annual value exceeds fifty pounds, prevents the defendant raising the question of value at the trial. (*Symons v. Rees*, 25 W. R. 116; 1 Ex. D. 416.)

The title must
be *bonâ fide* in
dispute.

In order to oust the jurisdiction of the Court the title set up must not be a mere suggestion or assertion of right. There must be a *bonâ fide* claim that has a legal foundation, and with some evidence to support it, and not an illusory claim advanced simply to take the case out of the cognizance of the county court. (*Lloyd v. Jones*, 6 C. B. 81; *Lilley v. Harvey*, 17 L. J., Q. B. 357; *Emery v. Barnett*, 27 L. J., C. P. 216; 4 C. B., N. S. 423; *Mountney v. Collier*, 22 L. J., Q. B. 124.) But the judge cannot assume jurisdiction because the claim to title does not appear to him to be supported by *bonâ fide* or sufficient evidence. (*Marsh v. Deices*, 17 Jur. 558.) And where the question of title is actually raised before the Court, and the judge continues to try the case, a prohibition will be granted. (*Lilley v. Harvey, supra*; *Chew v. Holroyd*, 22 L. J., Ex. 95.) Where it does not so appear upon the face of the proceedings, the judge should ascertain whether

title is in question, and his decision may be revised on motion for a prohibition. (*Thompson v. Ingham*, 14 Q. B. 710; *Sewell v. Jones*, 19 L. J., Q. B. 372; *Pearson v. Glazebrook*, L. R., 3 Ex. 27.)

Where a boundary wall merely is in dispute it does not oust the jurisdiction of the Court that the house or field of which it is the boundary is over the annual value of 50l. (*Rutherford v. Wilkie*, 41 L. T. 435; and see *Stolworthy v. Powell*, 55 L. J., Q. B. 228.)

As will have been noticed, the words of the statute are "to any corporeal or incorporeal hereditament;" but questions of title may be raised in the case of terms of years or for life. (*Chew v. Holroyd*, *supra*; *Mountney v. Collier*, 1 E. & B. 630; 22 L. J., Q. B. 124.)

Questions of title may arise in cases of terms of years or for life.

The jurisdiction conferred by sect. 60 (*supra*, p. 499) does not apply merely to actions expressly brought to try a question of title, but also to cases where it comes in question incidentally; and the provision in sect. 59, ousting the jurisdiction where title to lands of greater value than fifty pounds is in question, applies to proceedings for the recovery of small tenements (*Pearson v. Glazebrook*, L. R., 3 Ex. 27) under sects. 138 and 139 of the Act. (See *post*, Sect. 4, "Actions for the Recovery of Possession of Small Tenements.")

51 & 52 Vict. c. 48, s. 60, applies both to actions brought to try questions of title, and to cases where title arises incidentally; and the proviso in s. 59 applies to proceedings under ss. 138, 139.

Having clearly ascertained that the case is one within the jurisdiction of the Court, the claimant in an action for the recovery of land, like other plaintiffs in the county court, must commence his action by entering a plaint and issuing a summons (C. C. R. 1889, Ord. V. r. 1) in the district in which the hereditaments are situate. (51 & 52 Vict. c. 43, s. 59.)

Actions are commenced by "plaint."

As in the Supreme Court so in the county court, no cause of action, except claims in respect of mesne profits, arrears of rent, or double value, or damages for breach of any contract under which the property or part thereof is held, or for any wrong or injury to the premises, may be joined with an action for the recovery of land, except by leave of the judge or registrar. (C. C. R. 1889, Ord. IV. r. 1.)

Joinder of claims.

All persons in whom title is alleged must be joined as plaintiffs, and the person or persons alleged to be in possession or apparent possession of the premises must be defendants. (C. C. R. 1889, Ord. III. rr. 1, 2.) The plaintiff must also file with the registrar a full written

Parties.

Description of property.

description of the property, its annual value and rent, if any fixed or paid (Ord. VI. rr. 1 *a*, 4), with as many copies of such particulars as there are defendants. (Ord. LI. r. 15.) The plaint will not be vitiated merely by misnomer of one or more of the parties, or inaccurate description of the property, if the person or place be described so as to be commonly known. (51 & 52 Vict. c. 43, s. 73.)

Fees on entry
of plaint.

Upon entry of the plaint, a poundage fee of one shilling in the pound (estimated as upon a claim of 20%), and where a claim for rent or mesne profits is added an additional poundage on the amount claimed, but so that the poundage shall not be estimated on an amount exceeding 20%. (Treasury Ord., Jan. 1, 1889, Sched. (A)), must be paid to the registrar, who, on receipt, will give the plaintiff a plaint note. (C. C. R. 1889, Ord. VII. r. 1.)

Summons

The plaint having been entered in the "Plaint Book," the registrar (C. C. R. 1889, Ord. II. r. 4) will then issue a summons directed to and calling upon the defendants to appear to the plaint. (Form 215.) The summons must be dated of the day on which the plaint was entered, which is the date of the commencement of the action (C. C. R. 1889, Ord. VII. r. 2), and must contain the names of all the parties, with a copy of the particulars of the property claimed annexed (*ib.* r. 4), sealed with the seal of the Court. This is deemed part of the summons.

must bear
date of entry
of plaint,

contain names
of all parties,
and a copy of
the descrip-
tion of the
property
annexed.

The summons
must be served
thirty-five
clear days
before return
day.

The summons in an action under section 59 of the County Courts Act, 1888, should be delivered to the bailiff at least forty, and must be served thirty-five, clear days before the return day. (C. C. R. 1889, Ord. VII. r. 7.) Under the corresponding rule of the County Court Rules, 1886, it was held (*Barker v. Palmer*, 8 Q. B. D. 9; 51 L. J., Q. B. 110) that compliance with the rule as to *both* dates is a condition precedent to the hearing of the case, and one which the judge cannot waive without the consent of the defendant; but the wording of the present rule has been modified so as to make this decision applicable only to the date of *service*. Such time is given to enable a defendant or his landlord to apply to a judge of the High Court at chambers for a summons to the plaintiff to show cause why the action should not be tried in the High Court, on the ground that the title to lands or hereditaments of greater annual value than 50% would be affected by the decision in such action. If the judge should thereupon order the action to be tried in the Superior Court,

the proceedings in the county court must then be discontinued. The defendant must lodge the order before the return day of the summons with the registrar, who must record it in the "Plaint Book" and transmit it, with a copy of the summons and particulars, to the "Master" of the Queen's Bench Division named in the order, giving notice at the same time that he has done so to the plaintiff.

It has been doubted whether such an order puts an end to the proceedings in the case altogether, and thus compels a plaintiff to commence *de novo* in the Queen's Bench Division, or whether the order being in the nature of a certiorari the plaintiff may not dispense with issuing a writ in the High Court. But it is submitted that the proceeding by the defendant is in fact an objection to the jurisdiction of the county court, and that the plaintiff must consequently begin *de novo* by issuing a writ in the High Court, the pleadings being the same as in other actions.

If defendant successful, the plaintiff must commence *de novo* in the High Court.

The summons must, except in the cases otherwise specially provided, be served upon the defendant personally, or upon some person apparently not less than sixteen years old, at the defendant's house or dwelling or at his place of business (if he be the master or one of the masters thereof (C. C. R. 1889, Ord. VII. r. 9 *a*), unless the bailiff ascertain that he has removed to another place within the district, in which case the bailiff must serve the summons there. (Ord. II. r. 21 *a*.)

Service of summons, how effected.

In cases of vacant possession (*ante*, p. 483), or if the defendant cannot be found, and his place of abode be unknown or admission thereto cannot be obtained, posting a copy of the summons upon the door of the dwelling-house or other conspicuous part of the property, is good service upon the defendant. (C. C. R. 1889, Ord. VII. r. 21.) Where the bailiff is prevented by violence or threats from personally serving such summons, it will be sufficient to leave it as near to the defendant as practicable. (C. C. R. 1889, Ord. VII. r. 22.) Where, by reason of absence or other sufficient cause, service of the summons cannot be made, the judge or registrar may order substituted service. (C. C. R. 1889, Ord. LI. r. 6.)

In cases of vacant possession.

Where violence is threatened.

Where the answers given by the person to whom the summons is delivered, at the place mentioned therein as the residence or place of business of a defendant, render it doubtful whether the judge will be satisfied that service has come to the knowledge of the defendant before the

Notice of doubtful service to be given.

return day, the high bailiff must forthwith send notice to the plaintiff. (C. C. R. 1889, Ord. II. r. 24.)

Proof of service.

If the defendant does not appear at the hearing, the judge may, as is hereafter mentioned (*post*, p. 507), try the cause on the part of the plaintiff only, upon *proof of the service of the summons*. This, whether of home or foreign service, is done by the bailiff, if present, or by the endorsement on the copy signed by the bailiff, showing the fact and mode of such service. Wilfully and corruptly endorsing any false statement is a misdemeanour in such bailiff. (51 & 52 Vict. c. 43, s. 78.)

All questions as to sufficiency of the service and the proof thereof are entirely matters for the determination of the county court judge, and the High Court will not interfere with his decision. (*Zohrab v. Smith*, 7 D. & L. 635; 17 L. J., Q. B. 174; *Waters v. Handley*, 6 D. & L. 88; *Robinson v. Lenaghan*, 17 L. J., Ex. 174.)

Tenant defendant must give notice to his immediate landlord, pursuant to 15 & 16 Vict. c. 76.

Where the action is inconsistent with his immediate landlord's title, every tenant served with a summons in an action for the recovery of land, or to whose knowledge it shall come, must forthwith give notice to his immediate landlord or be liable, under the Common Law Procedure Act, 1852, s. 209 (*ante*, p. 483), to forfeit to his landlord three years' rack rent (see *Crocker v. Fothergill*, 2 B. & Ald. 652) of the premises.

Any person not named as a defendant may, by leave, appear and defend.

Any person not summoned as a defendant in an action for the recovery of land may, by leave of the judge or registrar, appear and defend on filing an affidavit (with a copy for each plaintiff and defendant), twelve clear days before the return day, showing that he is in possession, by himself or tenant, of the property or part thereof therein described; whereupon the registrar must enter the name, &c. of such person in the plaint book as an additional defendant, and send a notice (Form 217), with a copy of the affidavit annexed, of such entry to the plaintiffs and original defendants ten clear days before the return day, and in all subsequent proceedings the person filing the affidavit shall be named a defendant. (C. C. R. 1889, Ord. X. r. 4.)

Limitation of defence.

Where a defendant desires to limit his defence to a part only of the property sought to be recovered, he may, twelve clear days before the return day, file with the registrar a notice in writing, signed by himself or his solicitor, to that effect, describing the part with reasonable

certainty, together with as many copies of the notice and an additional copy, whereupon the registrar shall, ten clear days before the return day, send the same, sealed with the seal of the Court, by post to the plaintiff or plaintiffs. (C. C. R. 1889, Ord. X. r. 5, Ord. LI. rr. 15, 16, Form 218.)

Where a plaintiff desires to discontinue the action against all or any of the defendants, he must give notice in writing to the registrar, and to the party or parties as to whom the plaintiff desires to discontinue the action; and after the receipt of such notice, the party may apply *ex parte* for an order against the plaintiff for the costs incurred before the receipt of the notice, and of attending the Court to obtain the order. (C. C. R. 1889, Ord. IX. r. 1.) Discontinu-
ance of action.

Any defendant in an action to recover lands may, at any time before the return day, confess the action as to the whole or any part of the lands by signing, in the presence of any registrar or one of his clerks, or of a solicitor, and attested by the person in whose presence it is signed, an admission of the title of the plaintiff to the lands or to the said part thereof, and of his right to the possession thereof. (Forms 219, 237.) And the registrar shall upon the receipt of such admission, forthwith give notice thereof by post to the plaintiff, and the judge may, on the return day, upon proof of the signature of the defendant or defendants to such admission by affidavit or otherwise, in case the same is not attested by a registrar or his clerk, and without any further proof of the plaintiff's title (if no defendant other than the defendant signing such admission defends for the said lands or the said part thereof), give judgment for the plaintiff for the recovery of possession and for costs (Form 238); provided that if the plaintiff receive notice of such admission before the return day, he shall not be entitled as against any defendant signing to any costs incurred subsequently to the receipt of such notice, except the costs of attending the Court on the return day, unless the judge shall otherwise order; provided also, that where the admission is not signed by all the defendants defending for the said lands or the said part thereof, the trial shall proceed against all the defendants who shall not have signed, as if no admission had been signed. (C. C. R. 1889, Ord. IX. r. 6.) Confession by
defendant.

Order XVI. of the C. C. R. 1889, is framed upon the Discovery and
inspection.

lines of R. S. C. 1883, Ord. XXXI., and enables either party to an action, by leave of the judge or registrar, to deliver interrogatories in writing for the examination of any one or more of the opposite parties (Ord. XVI. r. 1), and also to apply to the judge or registrar for an order directing any other party to the action to make discovery on oath of the documents which are or have been in his possession or power relating to any question therein. (*Ib.* r. 10.) The judge or registrar, at any time during the pendency of any action, may order the production upon oath by any party thereto of any documents in his possession or power relating to any question in such action, and the judge or registrar may deal with such documents, when produced, in such manner as may be just. (*Ib.* r. 12.) Every party shall be entitled at any time by notice in writing to require any other party in whose particulars, notices, or affidavits, reference is made to any document, to produce such document for inspection, and for permission to take copies, and any party not complying with such notice shall not afterwards be at liberty to put such document in evidence, unless he shall satisfy the judge that he had some good excuse for not complying with such notice. (*Ib.* r. 13.) A party seeking discovery by interrogatories shall, before delivery thereof, pay into Court 20s., and 2s. per folio for every additional folio when the interrogatories exceed five folios; for discovery otherwise than by interrogatories, the applicant must pay into Court 20s. (*Ib.* r. 21.) See the rules as to discovery in the High Court. (*Ante*, p. 490.)

Admission of documents.

Where a party desires to give in evidence any document, he may, not less than five clear days before the trial, give notice to any other party to the action who is competent to make admissions, requiring him to inspect and admit such document. Unless the party so required shall within three days after receiving the notice make such admission, the expense of proof of it afterwards, whatever may be the result of the action, will have to be paid by him, unless the Court otherwise order. No costs of proof of any document will be allowed unless notice to admit has been given, except in cases where, in the opinion of the registrar, the failure to give notice has saved expense. (C. C. R. 1889, Ord. XVIII. r. 5.)

Notice to produce documents.

Either party may give notice to the other to produce at the trial any documents in his custody or control. The

notice must be according to the Form 91 in the Appendix to the County Court Rules, 1889 (C. C. R. 1889, Ord. XVIII. r. 6). The notice should point out with reasonable certainty what documents may be really called for. Upon failure or refusal to produce, service of the notice to do so must be proved, and then secondary evidence of the contents of the documents called for may be given by copy, orally, or otherwise. An affidavit by the party, his solicitor, or the clerk of either, of the service of the notice, and of the time of service, together with a copy of the notice, is in all cases sufficient evidence of the service and the time of service. (C. C. R. 1889, Ord. XVIII. r. 6.)

The action may at the instance of either party be tried by a jury (C. C. R. 1889, Ord. XXII. r. 3) of five (51 & 52 Vict. c. 43, s. 102), upon a demand for one being made in writing to the registrar five clear days before trial. (*Ib.* r. 1.) In cases where no demand for a jury has been so made, but at the trial both parties desire one, and no jury be then in Court, the judge may adjourn the trial upon terms in order that the necessary steps may be taken for such trial to take place. (*Ib.* r. 2.)

Action may be tried by a jury.

The action for the recovery of land is tried in the same manner as other actions in the county courts, the question being, generally speaking, whether the statement in the summons of the plaintiff's title to the property therein mentioned is true or false, and the evidence adduced in support of the plaintiff's case must be the same as would be adduced in the High Court in a similar action.

Proceedings at trial.

Upon the trial being called on, if the plaintiff does not appear, and the defendant appears but does not admit the claim, the judge may allow the defendant the same costs as if the action had been tried, but no hearing fee shall be charged. (C. C. R. 1889, Ord. XXII. r. 5.)

Where plaintiff does not appear.

If the plaintiff appears and the defendant does not appear, the plaintiff, on proof of service of the summons (*ante*, p. 504) and of his title, will be entitled to judgment for the recovery of possession. (51 & 52 Vict. c. 43, s. 91.)

Where defendant does not appear.

If both parties appear, upon payment by the plaintiff to the registrar of the hearing fee of two shillings in the pound (51 & 52 Vict. c. 43, ss. 165, 166), estimated upon 20%. (Treasury Order, 1st Jan. 1889, Sched. A.), the trial proceeds much in the same manner as in the Supreme Court. The judge, in the absence of a jury (*supra*),

Where both parties appear.

decides all questions of fact as well as of law. (51 & 52 Vict. c. 43, s. 100.) The claimant or his advocate, if he employ one, states his case and adduces evidence in its support. The defendant or his advocate then, in his turn, addresses the Court and calls his witnesses; but although in some Courts he is allowed to sum up his evidence, the judges generally do not permit him to make a second speech, the plaintiff being entitled to a general reply.

Where plaintiff's title has expired before trial.

If it appear at the hearing that the plaintiff's title existed, as alleged in the summons, at the time of entry of the plaint, but that it expired before the return day, the plaintiff will be entitled to judgment according to the fact that he was so entitled, and for his costs, unless the judge otherwise order. (C. C. R. 1889, Ord. XXIII. r. 10.)

Action for same cause in another Court.

Where at the trial it shall appear that an action for the same cause at the suit of the same plaintiff is pending in any other Court of record, the judge shall order the trial to stand adjourned to a certain day, and unless before that day the action in the other Court shall have been discontinued, the action shall be struck out. (C. C. R. 1889, Ord. XXII. r. 9.)

Judgment.

Execution where judgment for plaintiff.

When the hearing of the case is ended, the judge pronounces judgment in a summary way, or, if there be a jury, sums up to them, and they return a verdict. Upon judgment for the plaintiff, execution may issue upon the day, if any, named therein; if no day be named, it may issue after the expiration of fourteen clear days from the day on which judgment was given (C. C. R. 1889, Ord. XXV. r. 46); and may be enforced by a warrant of possession (*ib.* r. 45), which will only issue upon an affidavit of service of the order for delivery of possession and disobedience thereto. (*Ib.* r. 49.) If the judgment be for recovery of possession and costs, there may be either one or separate warrants of execution for the recovery of possession and for costs at the election of the plaintiff. (*Ib.* r. 47.) If judgment be for the defendants or any of them with costs, execution may issue for the costs against the plaintiff upon the day, if any, named in the judgment; if no day be named, then at the expiration of fourteen clear days from the day on which judgment was given. (*Ib.* r. 48.)

Where judgment is for possession and costs.

Where judgment is for defendant, with costs.

Costs.

The judge may in his discretion order the costs to be taxed under columns A, B, or C in the Scale of Costs, and in default of any such order they will be taxed under

column B. (C. C. R. 1889, Ord. LA., r. 9.) The judge may also, by special order, in cases in which a party appears by solicitor, without counsel, allow the special items 31 and 70 in the scale, and may, if counsel is instructed, where there is no local bar in the Court town or within twenty miles of it, and the Court is not within twenty-five miles of Charing Cross, allow the additional fee to counsel mentioned in item 86. (*Ib.* rr. 6, 7.) The judge may also, under item 93, allow a fee to counsel for settling particulars, interrogatories, &c. (*Ib.*)

When a cause is struck out for want of jurisdiction, the judge has power to award costs in the same manner, to the same extent, and recoverable in the same manner as if the Court had jurisdiction, and the plaintiff had not appeared, or had appeared and failed to prove his demand or complaint. (51 & 52 Vict. c. 43, s. 114.)

In actions for the recovery of land, unless the parties Appeal. have before judgment agreed in writing that the decision of the judge shall be final (51 & 52 Vict. c. 43, s. 123), an appeal lies from the county court (51 & 52 Vict. c. 43, s. 120) to a Divisional Court of the High Court. It has been held (*Earl of Shrewsbury v. Garfield*, 60 L. J., Q. B. 765; 65 L. T. 748) that leave of the county court judge is necessary where the yearly rent or value does not exceed 20*l.*, but this decision is doubtful. The decision of the Divisional Court is final, unless special leave to appeal be given by the same tribunal. (36 & 37 Vict. c. 66, s. 45.)

An appeal lies when "any party . . . shall be dissatisfied with the determination or direction of the Court in point of law or equity, or upon the admission or rejection of evidence." (51 & 52 Vict. c. 43, s. 120.) There can be an appeal, therefore, only on a question of law or equity, not on a question of fact. (*East Anglian Rail. Co. v. Lythgoe*, 20 L. J., C. P. 84; 10 C. B. 726; *Cousens v. London Deposit Bank*, 45 L. J., Q. B. 573; 1 Ex. D. 404.) Where the case is tried by the judge alone, an appeal will only lie where it appears that the judge has, as it were, misdirected himself in point of law, that is, when it is apparent that his decision is the result of the misapplication of the rules of law to the facts of the case. (*Cawley v. Furnell*, 20 L. J., C. P. 197; 12 C. B. 291; *Cuthbertson v. Parsons*, 21 L. J., C. P. 165; 12 C. B. 304; *Hill v. Persse*, 25 W. R. 275; *Williams v. Williams*, 37 L. J., Ch. 854.)

On what ground an appeal lies.

Mode of appeal.

The statutes giving the right of appeal in county court cases provided for an appeal in two ways, viz., by special case or by motion. Now there is only one mode of appeal, for the Rules of Supreme Court issued in December, 1885, provide that "every appeal shall be by notice of motion." (R. S. C. 1883, Ord. LIX. rr. 9, 10, 18; C. C. R. 1889, Ord. XXXII.; *Reg. v. Kettle*, 55 L. J., Q. B. 470; 17 Q. B. D. 761.)

Notice of motion.

The notice of motion is an eight days' notice, and must be served on every party directly affected by the appeal. It shall state the grounds of appeal, and whether all or part only of the judgment is complained of. (R. S. C. 1883, Ord. LIX. r. 10.)

Time for service of.

The notice of motion must be served and the appeal entered within twenty-one days from the date of the judgment, order, or finding, calculated from the time at which the judgment is signed, entered, or otherwise perfected, or from the time at which the finding or any refusal is made or given. (*Ib.* r. 12.) If the appeal is from the finding of a jury, the time runs from the time when the verdict is given, though judgment be given after. (*Rawnsley v. L. & Y. Ry. Co.*, 35 W. R. 771.) Under the old practice it was held that where the judge reserved a point and afterwards decided against the party moving, such party still had a right of appeal dating from such decision. (*Foster v. Green*, 30 L. J., Ex. 263.) So where judgment was reserved, and notice thereof subsequently sent to the parties for the purposes of appeal, the date of the judgment was the date of the notice, and not the day for which the judgment was ordered to be entered up. (*Waterton v. Baker*, L. R., 3 Q. B. 176; *Francis v. Dowdeswell*, L. R., 9 C. P. 430.) On appeal against an order granting or refusing a new trial, the time runs from the decision of the judge on such application. (*Dingor v. Matthews*, 88 L. T. Journ. 139. See *Pole v. Bright*, [1892] 1 Q. B. 603.) But the High Court has power to extend the time for appealing, as well as to amend the grounds of appeal and to make any other order on such terms as the Court shall think just, to ensure the determination of the merits of the real question in controversy between the parties. (R. S. C. 1883, Ord. LIX. r. 16. See *Cusack v. L. & N. W. Ry. Co.*, [1891] 1 Q. B. 347.)

Appeal no stay of execution.

The appeal will not operate as a stay of proceedings under the decision appealed from unless the county court

judge shall so order, or unless within ten days after the decision a deposit shall be made or security given to the satisfaction of such judge for a sum to be fixed by him not exceeding the amount of the money, or the value of the property affected by the judgment, order, or finding appealed from. (*Ib.* r. 14.)

By Ord. LIX. r. 13 of R. S. C., 1883, it was provided that forthwith upon the entering of the appeal the master of the Crown Office department is to apply to the county court judge for a copy of the notes of the evidence given, and for a statement of his judgment or finding on any question of law under appeal; but this provision is now superseded by sect. 121 of the Act of 1888, which enacts that where there is a right of appeal and the judge has at the request of either party made a note, he must at the expense of any party furnish a copy of the note, or allow a copy to be taken by or on behalf of such party, and must sign the note whether notice of motion by way of appeal has been served or not. (51 & 52 Vict. c. 43, s. 121.) But a request must have been made to the judge at the trial to take a note, otherwise he will not be bound to furnish or sign a copy. (*Ib.* s. 120; *Morgan v. Rees*, 6 Q. B. D. 508.) If the judge's notes are not produced, the Court may hear and determine the appeal upon such evidence or statement of what occurred which the Court may deem sufficient (*Ib.* r. 8), provided an application to take a note has been properly made to the judge at the trial. (*Cook v. Gordon*, 61 L. J., Q. B. 445.)

The Divisional Court may, under special circumstances, order an appellant to give security for costs. (R. S. C. 1883, Ord. LIX. r. 17; *Swain v. Follows*, 18 Q. B. D. 585.)

SECT. 4.—*Action in the County Court for the Recovery of Possession of Small Tenements.*

In the last section we considered the proceedings in "the action for the recovery of land" in county courts under the provisions of sect. 59 of the Act of 1888. (51 & 52 Vict. c. 43, *ante*, p. 498.)

In now passing on to a consideration of the action for the "recovery of possession of small tenements" in county courts, under the provisions of sects. 138 and 139 of the Landlord must proceed under ss. 138, 139, of 51 &

52 Vict. c. 43,
when appli-
cable.

Act, it must be remembered that the plaintiff must, where he can do so, bring his action under sects. 138 and 139, as in that case no action can be brought under sect. 59. (C. C. R. 1889, Ord. V. r. 3.) The landlord who proposes, being guided by the annual value of his property, to commence his action in the county court should therefore carefully consider whether this form of proceeding is open to him. If an action for ejectment be pending for the same premises, the plaintiff must elect between his remedies. (C. C. R. 1889, Ord. XXII. r. 9.)

Proceedings
against tenant
(A) holding
over; or
(B) for non-
payment of
rent.

Proceedings (which are to be distinguished as actions “for the recovery of possession”: see C. C. R. 1889, Ord. V. r. 3) may be advantageously taken in the county court under sects. 138 and 139, in two classes of cases, namely—(a) where a tenant holds over after the legal determination of his tenancy, and (b) where the landlord has a legal right of re-entry and possession on the ground that his rent is unpaid.

(A) Against
tenant hold-
ing over.
51 & 52 Vict.
c. 43, s. 138.
Landlord
may recover
possession,

When the term and interest of the tenant of any corporeal hereditament, where *neither* the value of the premises *nor* the rent payable in respect of them exceeds 50*l.* by the year, and on which no fine or premium has been paid, has expired or been determined by a notice to quit, and the tenant or any person holding or claiming by, through, or under him neglects or refuses to deliver up possession of the premises, the landlord may at his option enter a plaint in the county court of the district where the premises lie for their recovery, either against the tenant or the person so neglecting or refusing, whereupon a summons will issue in the ordinary way. (51 & 52 Vict. c. 43, s. 138.)

In the case of *Friend v. Shaw* (20 Q. B. D. 374), it was decided under the corresponding section (sect. 50) of the repealed Act (19 & 20 Vict. c. 108), where the words were “determined by a *legal* notice to quit,” that this meant the notice to quit required by law, and not one depending upon the express stipulation of the parties. It would seem that the omission of the word “legal” in the existing section removes the restriction put upon the statute in that case.

and claim for
rent and
mesne profits.

The plaintiff may also, as against the *tenant*, add a claim for rent or mesne profits, or for both, down to the day appointed for the hearing, or to any preceding day to be named in the plaint, so that the aggregate amount does

not exceed 50l. (51 & 52 Vict. c. 43, s. 138); but where the proceedings are taken not against the landlord's own immediate tenant, but against other persons in possession, there is no right to add a demand for rent or mesne profits. (*Campbell v. Loader*, 3 H. & C. 520; 34 L. J., Ex. 50.)

The form of summons is given C. C. R. 1889, Form 211. It must be served in the ordinary way, but if the defendant cannot be found, and his dwelling is unknown, or admission cannot be obtained for service, a copy of the summons may be posted on some conspicuous part of the premises sought to be recovered, and such service will be good. (51 & 52 Vict. c. 43, s. 141.)

Where the title comes into question, and the yearly rent or value exceeds 50l., the Court has no jurisdiction. (51 & 52 Vict. c. 43, ss. 56, 60.) Thus, although the judge may decide as to whether the tenancy was determined either by effluxion of time or by a legal notice to quit, and his decision thereon is conclusive (*Fearon v. Norvall*, 5 D. & L. 439), he cannot decide as to whether the claimant has or has not a title as landlord (*Kerkin v. Kerkin*, 3 E. & B. 399; *Pearson v. Glasbrook*, 37 L. J., Ex. 15), if the limit of value or rent be exceeded. (*Ante*, p. 501.) It is therefore very necessary before entering the plaint to consider—(1) is the title in question, and (2) does the yearly rent or value exceed 50l.? If these two questions can be answered in the affirmative, the Court has no jurisdiction, and the case must be taken into the High Court, unless by the written consent of both parties, signed by them or their solicitors (51 & 52 Vict. c. 43, s. 61), jurisdiction is given to the county court to hear and determine the cause. But, without such consent, it is the duty of the judge to ascertain whether any real dispute or question between the parties, as to the right or title of the plaintiff or of the defendant to the tenements in question, legally may and actually does exist between the parties. (*Lilley v. Harvey*, 5 D. & L. 648; *Fearon v. Norvall*, *ib.* 439; *Marwood v. Waters*, 13 C. B. 820; *Latham v. Spedding*, 17 Q. B. 440; *Lloyd v. Jones*, 6 C. B. 81.)

Court has no jurisdiction where title to premises above the yearly value or rent of 50l. comes into question.

Thus, where a defendant set up as defence that he had given up possession to a third party, who made a *bonâ fide* claim, it was held that the judge ought not to have refused to hear the case on the ground that title came into question until he had ascertained and decided that the defendant gave up possession by compulsion; because if he gave it

Cases where title comes into question.

up voluntarily, he would be estopped from setting up the third person's title as against his landlord's, and the Court would have jurisdiction. (*Emery v. Barnett*, 27 L. J., C. P. 216.) Title is in question where the tenant makes a *bond fide* claim of ownership or alleges title in a third person. (*Marwood v. Waters*, 13 C. B. 821; and see *ante*, p. 500.)

Ordinary
relation of
landlord and
tenant must
exist.

In order to maintain this action, the ordinary relation of landlord and tenant must exist between the parties; the term "landlord" being understood to mean the person entitled to the immediate reversion of the property, or, in the case of joint tenancy, coparcenary, or tenancy in common, any one of the persons entitled to such reversion. (51 & 52 Vict. c. 43, s. 186.) Thus a plaintiff mortgagee cannot recover possession from a defendant, tenant of the mortgagor, unless he has consented to hold under the plaintiff (*Jones v. Owen*, 5 D. & L. 669; 18 L. J., Q. B. 8); and it was held that the Court had no jurisdiction where the action was against an occupier in possession under an agreement to purchase, one of the terms of which was that the rent should be deducted from the purchase-money, and it appeared that he had paid a sum, which, together with a set-off, equalled the amount of the purchase-money (*Banks v. Rebbeck*, 20 L. J., Q. B. 476); for in neither instance does the *ordinary* relation of landlord and tenant exist. (See also *Jones v. Thomas*, 4 L. T., N. S. 210.) The plaintiff must therefore show generally that such a relationship did exist. He must prove:—

Evidence for
plaintiff.

(1.) Proof of
tenancy.

(1.) The tenancy or holding. If by lease, the lease or a counterpart must be produced, or proof must be given that defendant has admitted its terms. (*Howard v. Smith*, 3 Sc. N. R. 574.) A demise or tenancy from year to year may be proved by payment and receipt of yearly rent (*Doe v. Horn*, 3 M. & W. 333; *Bishop v. Howard*, 2 B. & C. 100), even, as we have seen (*ante*, p. 8), where the defendant has been let into possession under a lease void by the Statute of Frauds, or a mere agreement for a future lease. (*Doe v. Bell*, 5 T. R. 471; *Doe v. Amey*, 12 A. & E. 476; *Walsh v. Lonsdale*, 21 Ch. D. 9.)

(2.) Yearly
value nor
rent has
exceeded 50%.

(2.) That "neither the value of the premises nor the rent payable in respect thereof" has exceeded 50% by the year. This must be proved at the trial, whether the defendant does or does not appear; as must—

(3.) Expira-
tion or de-
termination
of tenancy.

(3.) The expiration or other determination of the tenancy, with the time or manner thereof. (*Ante*, Chap. VIII. p. 343.)

The decision of the county court judge, upon the question whether the tenancy has been duly determined by notice to quit, is conclusive between the parties. (*Fearon v. Norvall*, 17 L. J., Q. B. 161.)

(4.) That "no fine or premium" was paid for the lease. (4.) No fine or premium paid.

(5.) That the defendant has neglected or refused, and still neglects or refuses, to deliver up possession. For the purpose of proving this, it is advisable to make a demand of possession, and, if possible, obtain a refusal. But proof that the defendant retains possession after demand made is *prima facie* evidence that he refuses or at all events neglects to deliver up possession. (Cole, Eject. 656.) (5.) Neglect or refusal to give up possession.

(6.) Where the defendant does not appear, service of the summons must be proved. (As to mode of service, see *ante*, p. 504.) The judge's decision as to sufficiency of the service is conclusive. (*Robinson v. Lenaghan*, 2 Ex. 333.) (6.) Service of the summons.

(7.) Should the title of the landlord have accrued since the letting of the premises, the plaintiff must prove, in addition to the above facts, the right by which he claims possession, not that his title can come in issue, but in order that his character as landlord may appear. (*Ante*, p. 514.) His right may be evidenced by length of possession (*Doe v. Cooke*, 7 Bing. 346), or title as heir or administrator, or by will or conveyance. (7.) Plaintiff's title.

After such proof has been given, unless the defendant show good cause to the contrary, as, for example, by proving that the plaintiff's evidence is insufficient upon some of the above material points, or by producing contrary evidence, so far as he is not estopped from so doing by the relationship of landlord and tenant, the judge may order that possession be given by the defendant to the plaintiff either forthwith or on or before such day as the judge shall think fit to name (C. C. R. 1889, Form 213); but such order need not be drawn up or served. (51 & 52 Vict. c. 43, s. 138.) If the order be not obeyed, the registrar, whether service of the order can be proved or not, must, at the instance of the plaintiff, issue a warrant authorizing and requiring the high bailiff to give possession of the premises to the plaintiff (C. C. R. 1889, Form 214), such warrant to bear date the day next after the last day named by the judge in his order for possession to be given, and to remain in force for three months from such date. (51 & 52 Vict. c. 43, s. 138.) Armed with this warrant the bailiff is justified in entering on the premises Judgment.
Order for possession.
Warrant for possession.

between 9 a.m. and 4 p.m. with such assistants as he may deem necessary, and giving possession to the plaintiff accordingly. (51 & 52 Vict. c. 43, s. 142.)

An order for the giving up of possession of premises under this section is not analogous to a judgment in ejectment, or conclusive evidence of title in a subsequent action for mesne profits. Where, therefore, a landlord, having given his tenant and sub-tenant a week's notice to quit, entered a plaint against them in the county court, and the judge ordered that possession should be delivered up on a day named, which was done, and the landlord afterwards sued the sub-tenant in a superior Court for mesne profits, it was held that the order of the county court judge was not conclusive as to the plaintiff's right to possession, but that it was competent for the sub-tenant to prove that the term of the tenant was a quarterly holding and had not been determined by a proper notice to quit. (*Campbell v. Loader*, 3 H. & C. 520; 34 L. J., Ex. 50; 13 W. R. 348; and see *Hudson v. Walker*, 41 L. J., Ex. 51; L. R., 7 Ex. 55.)

The warrant of possession can neither be issued nor executed when the lands are situated without the jurisdiction of the Court, although both parties reside within it. (*Ellis v. Peachey*, 18 L. J., Q. B. 137; 5 D. & L. 675.) The order of possession does not affect the rights of third persons; hence a person whose rights are injuriously affected may maintain trespass against the person obtaining the warrant and on whose behalf it is executed. (*Hudson v. Walker*, *supra*.)

(B) Proceedings against tenant for non-payment of rent.

51 & 52 Vict. c. 43, s. 139.

No formal demand or re-entry necessary.

Thus far we have been considering cases within section 138, where the tenancy has expired or been determined by legal notice to quit; but, as before mentioned (*ante*, p. 512), the landlord may also under section 139 of the Act commence proceedings in the county court where he is unable to obtain payment of his rent, and the same is one half-year in arrear, in cases where he has by law a right to re-enter and take possession on non-payment thereof; provided, of course, that neither the value of the premises nor the rent exceeds 50*l.* per annum. In such a case no formal demand or re-entry is necessary, as the statute expressly provides that the service of the summons shall stand in lieu of a demand and re-entry. If, however, the tenant, five clear days before the return day of the summons, pays into Court all the rent in arrear and costs, the action ceases. If he neither makes such payment, nor

at the time named in the summons shows good cause why the premises should not be recovered, then, on proof—

- (1) Of the yearly value and rent of the premises;
- (2) That one half-year's rent was in arrear before the plaint was entered, and that no sufficient distress (see *ante*, pp. 368—370) was then to be found on the premises to countervail such arrear;
- (3) Of the landlord's power to re-enter—this can only be by virtue of some condition or proviso contained in the lease or agreement, whether by deed, in writing, or by oral agreement, express or implied;
- (4) That the rent is still in arrear;
- (5) Of the title of the plaintiff if such title has accrued *since* the letting of the premises; and,
- (6) Of the service of the summons in cases where defendant does not appear;

the judge may order (C. C. R. 1889, Form 212) that possession of the premises mentioned in the plaint be given by the defendant to the plaintiff on or before such day, not being less than four weeks from the trial, as the judge may name, unless within that period all the rent in arrear and the costs be paid into Court. If the order be not obeyed, and the rent and costs be not so paid, the order may be enforced in manner already mentioned (*ante*, p. 515), the proceedings under both sections being similar in that respect. In proceedings for non-payment of rent, however, the plaintiff, having obtained possession, will hold the premises discharged from the tenancy; and the defendant, and all persons claiming by, through, or under him, will, so long as the order remains unreversed, be barred from all relief. (51 & 52 Vict. c. 43, s. 139.) Any fine or premium paid for the lease does not deprive the Court of jurisdiction under s. 139 as it does under s. 138.

In these cases, as in actions of ejectment, whether in the High Court, or in the county court, under s. 59 (51 & 52 Vict. c. 43, s. 59, *ante*, p. 498), when the summons is served on, or comes to the knowledge of, any sub-tenant of the plaintiff's immediate tenant, such sub-tenant being an occupier of the whole or a part of the premises sought to be recovered, must forthwith (*i.e.*, with all reasonable celerity, *ante*, p. 484) give notice of it to his immediate landlord; and such landlord, on receipt of the notice, if not originally a defendant, may be added or substituted as a defendant to defend the possession of the premises in question. If

Sub-tenant served with summons must give notice to his immediate landlord.

the sub-tenant omit to give such notice to his immediate landlord he is liable to the penalty of forfeiting three years' rack-rent of the premises held by him to his landlord. (51 & 52 Vict. c. 43, s. 140.) The action for this penalty must be brought in the county court whence the summons issued, although it may exceed in amount the general statutory limit within which the county courts have jurisdiction. (*Ib.*)

Protection
of officers.

No action or prosecution may be brought against the judge, registrar, bailiff, or other person for issuing or executing any warrant or affixing any summons, on the ground that the person suing out the same had not lawful right to the possession of the premises. (*Ib.* s. 144.)

Landlord
with lawful
title not a
trespasser.

The person, however, who sues out the warrant is not so protected. Where the landlord at the time of applying for the warrant had lawful right to possession of the premises, neither he nor his agent may be deemed a trespasser by reason merely of any irregularity or informality in the mode of proceeding; but the party aggrieved may bring an action on the case, in which he must allege special damage, and may recover full compensation with costs of suit. If the special damage be not proved, the defendant will be entitled to a verdict; if proved, but the jury assess it under five shillings, the plaintiff can recover no more costs than damages, unless the judge before whom the trial takes place, certifies that in his opinion full costs ought to be allowed. (*Ib.* s. 145.)

Appeal.

In all actions where the yearly rent or value of the premises exceeds 20*l.* an appeal lies as of right; where the rent or value is below that amount, then an appeal lies by leave of the judge in manner already described. (*Ib.* s. 120, *ante*, p. 509).

SECT. 5.—*Proceedings before Justices of the Peace—Recovery of Small Tenements held over.*

1 & 2 Vict.
c. 74.

The "Act
to facilitate
the recovery
of possession

In order "to facilitate the recovery of possession of tenements after due determination of the tenancy," the statute 1 & 2 Vict. c. 74 provided in certain cases a summary mode of obtaining the possession of premises, by proceedings before justices of the peace, which may, where

applicable, very frequently be found less expensive and more advantageous to landlords than proceeding in the county court.

When the term of the tenant of any property held by him at will, or for any term not exceeding seven years at a rent (if any) not exceeding 20% a year, and upon which no fine has been reserved or made payable, shall have ended or been determined by legal notice to quit or otherwise, and such tenant or the actual occupier neglect or refuse to quit and deliver up possession, the landlord or his agent may cause such tenant or occupier so refusing, to be served with a written notice, signed by the landlord or his agent, of his intention to proceed to recover possession under this Act; and if the tenant or occupier do not appear at the time and place, and show to the satisfaction of the justices reasonable cause why possession should not be given, and still neglect or refuse to deliver up possession, the landlord or his agent may give proof of the holding and of the end or other determination of the tenancy with the time and manner thereof, and where the landlord's title has accrued since the letting of the premises the right by which he claims possession; and upon proof of service of the notice, and of the neglect or refusal of the tenant or occupier, the justices acting for the place within which the premises, or any part thereof, be situate, in petty sessions assembled, or any two of them, may issue a warrant to the constables and peace officers of such place commanding them, within not less than twenty-one nor more than thirty clear days from date of warrant, to enter, by force if needful, and give possession to the landlord, or his agent. Such entry not to be made on Sunday, Good Friday, Christmas Day, or at any time except between 9 a.m. and 4 p.m. Nothing in this Act is to protect any person obtaining the warrant from an action if he has no lawful right to the possession, or to affect the rights of an outgoing tenant by the custom of the country or otherwise. (1 & 2 Vict. c. 74, s. 1.)

The notice to be given pursuant to the above section must be in the form prescribed, which is as follows:—

“I, _____, owner (or agent to the owner, *as the case may be*) do hereby give you notice that unless peaceable possession of the tenement (*shortly describing it*) situate _____, which was held of me (or of the said _____ *as the case may be*) under a tenancy from year to year (or *as the case may*

of tenements after due determination of the tenancy.”

Proceedings by landlord after tenancy determined.

1 & 2 Vict. c. 74, s. 1.

Notice of intention to proceed before justices pursuant to this Act.

be), which expired (or was determined) by notice to quit from the said (or otherwise as the case may be) on the day of , and which tenement is now held over and detained from the said , be given to (the owner or agent) on or before the expiration of seven clear days from the service of this notice, I, , shall on next, the day of , at of the clock on the same day at [a notice omitting to state the place at which the application will be made is bad, *Delaney v. Fox*, 1 C. B., N. S. 166] apply to her Majesty's justices of the peace acting for the district of (being the district, division, or place in which the said tenement or any part thereof is situate), in petty sessions assembled, to issue their warrant directing the constables of the said district to enter and take possession of the said tenement, and to eject any person therefrom. Dated this, &c.

“Signed

“ (Owner or agent.) ”

Service of
this notice.

Service of this notice may be either personal or on some person at the premises. It must be read over and explained to the person served, or with whom the same is left. If the person holding over cannot be found it may be posted up on some conspicuous part of the premises. (1 & 2 Vict. c. 74, s. 2.)

Complaint.

If possession be not given within seven clear days, the owner or agent may lay a complaint before two justices or a stipendiary magistrate in the prescribed form (No. 2 in the Schedule to the Act), annexing a duplicate of the notice. The complaint will be heard on a day named in the notice to the tenant.

Evidence.
Requisites to
successful
prosecution
of proceed-
ings.

The demise
must be at
will or for a
period not
exceeding
seven years.

In order to enable a landlord to succeed before justices, there must be a concurrence of the following circumstances, of which evidence must be given :—

(1.) The premises must have been demised under a lease or agreement, express or implied, at will, or for any term not exceeding seven years. And as the statute only applies as between landlord and tenant, it must be shown that the occupation was that of a tenant. The fact, but not the duration of the tenancy, may be proved by parol evidence, even where there is a written agreement. (*Ingram v. Knowles*, 20 L. T. 208.) As to varieties of tenancies, see Chap. I., and as to occupations which do not create tenancies, *ante*, p. 12.

(2.) The rent reserved must not have exceeded 20% a year. The rent.

(3.) No fine must have been reserved or made payable. No fine.

(4.) The term or tenancy must have ended or been duly determined by a legal notice to quit *or otherwise*. By virtue of the words "or otherwise," the tenancy may have been determined by entry for a forfeiture other than non-payment of rent. Evidence of the time and manner in which the tenancy determined must be given. Term ended or been determined.

(5.) Where the landlord's title has accrued since the letting the right by which he claims possession must be shown. When landlord's title.

(6.) Proof must be given of the service of the notice, and that the tenant or occupier neglected or refused to deliver up possession of the premises. Where the person wrongfully withholding the premises is an under-tenant or assignee, the landlord should take proceedings against him and not against the original lessee. Tenant or occupier must have neglected or refused to give up possession.

(7.) The landlord *or his agent* may proceed alone under this Act, which in some instances is an advantage, as rendering the employment of a solicitor unnecessary, the "agent" being competent to represent the landlord. Landlord or his agent are alone competent to proceed under this Act.

The jurisdiction of the justices is neither ousted by the tenant setting up title in a third person, if the tenancy and its legal determination are proved to their satisfaction (*Rees v. Davies*, 5 C. B., N. S. 56), nor by a claim of title in proceedings to recover possession of a house alleged to belong to a parish, under 59 Geo. 3, c. 12, s. 24, as in that case the question of title is necessarily involved in the matter which the justices have to determine. (*Ex parte Vaughan*, L. R., 2 Q. B. 114; 36 L. J., M. C. 17.) But the tenant may show that he has acquired title by the Statute of Limitations, so that no warrant should be issued. (*Webb v. Fordred*, 32 J. P. 114.) Jurisdiction of justices not ousted by questions of title.

If the tenant does not appear or does not show to the justices reasonable cause why possession should not be given, a warrant for possession will be issued. (See Form 3 in the schedule to the Act.) The issue of such a warrant does not prevent the landlord entering before the period named in it has expired, if he can do so peaceably. (*Jones v. Foley*, [1891] 1 Q. B. 730; 60 L. J., Q. B. 464.) Warrant.

When the person obtaining the warrant has not lawful right to possession, the tenant may enter into a bond with two sureties, to be approved by the justices, to sue the Any person obtaining warrant, without law-

ful right to possession, liable to action for trespass.

No action against justices, &c.

person obtaining the warrant for trespass, and the warrant will then be delayed. (1 & 2 Vict. c. 74, ss. 3, 4.)

Actions shall not be brought against the justices or constables for issuing or executing such warrants, by reason that the person on whose application the same shall be granted had not lawful right to the possession of the premises. (1 & 2 Vict. c. 74, s. 5.) But it seems doubtful whether third persons who assist the constable in executing the warrant are similarly protected. (*Darlington v. Pritchard*, 4 M. & Gr. 783, 794; 12 L. J., C. P. 34; and see *Jones v. Chapman*, 14 M. & W. 124.) An action of trespass will lie against the landlord for obtaining a warrant and turning the tenant out of possession, if it turn out that such landlord at the time had no right to the possession (*Darlington v. Pritchard*, *supra*); but where the landlord has at the time of applying for the warrant a lawful right to possession of the premises so held over, neither the landlord nor his agent or any other person acting in his behalf shall be deemed to be a trespasser merely by reason of any irregularity or informality in the mode of proceeding for obtaining possession under the authority of the Act. (1 & 2 Vict. c. 74, s. 6.)

Construction of Act.

In the construction of this Act "premises" signifies lands, houses, or other corporeal hereditaments; "person" comprehends a body politic, corporate, or collegiate, as well as an individual; words importing the singular number, where necessary, extend and apply to several persons or things, as well as to one; words importing the masculine, where necessary, extend and apply to the feminine gender; the term "landlord" signifies the person entitled to the immediate reversion of the premises, or if the property be held in joint tenancy, coparcenary, or tenancy in common, any one of the persons entitled to such reversion; and "agent" means any person usually employed by the landlord to let the premises or collect the rents thereof, or specially authorized to act in the particular matter by writing under the hand of the landlord. (1 & 2 Vict. c. 74, s. 7.)

Extension of Act.

1 & 2 Vict. c. 74 has been extended to masters of grammar, charity and other schools (3 & 4 Vict. c. 77, s. 19; 4 & 5 Vict. c. 38, s. 18, and 23 & 24 Vict. c. 136, s. 13); to occupiers of poor allotments (8 & 9 Vict. c. 118, s. 111); to persons encroaching on lands enclosed (15 & 16 Vict. c. 79, s. 13; *Chilcote v. Youldon*, 29 L. J., M. C. 197),

and to occupiers of lands vested in the Secretary of State for War. (22 & 23 Vict. c. 12, s. 5.)

SECT. 6.—*Recovery of deserted Premises by Proceedings before Justices.*

If any tenant holding any lands, tenements or hereditaments at a rack rent, or, where the rent reserved shall be full three-fourths of the yearly value of the demised premises, who shall be in arrear for one year's rent [since amended to one half-year's rent, although no express right of re-entry reserved, 57 Geo. 3, c. 52], shall desert the demised premises, and shall leave the same uncultivated or unoccupied so as no sufficient distress can be had to counter-vail the arrears of rent, it shall and may be lawful for two or more justices of the peace for the county or place (having no interest in the demised premises), at the request of the lessor or landlord, lessors or landlords, or his, her, or their bailiff and receiver, to go upon and view the same, and to affix, or cause to be affixed on the most notorious part of the premises, notice in writing what day—at the distance of fourteen days at least—[clear days, *Creak v. Justices of Brighton*, 1 F. & F. 110] they will return to take a second view thereof; and if upon such second view the tenant or some person on his or her behalf shall not appear or pay the rent in arrear, or there shall not be sufficient distress on the premises, then the said justices may put the landlord or landlords, lessor or lessors, into the possession of the said demised premises, and the lease thereof to such tenant as to such demise shall from thenceforth become void. (11 Geo. 2, c. 19, s. 16.)

An appeal lies from the justices to the judges on circuit in the respective counties in which the premises lie (see *Reg. v. Sewell*, 8 Q. B. 161), and if they lie in the city of London or county of Middlesex, then to the judges of the Queen's Bench Division. (11 Geo. 2, c. 19, s. 17.)

In the metropolis it is not necessary that the magistrate should go personally to view the premises, but he may issue a warrant to a constable of the metropolitan police to affix the notice, and upon a return to such warrant and proof that neither the tenant nor any person on his behalf appeared and paid the rent, and that there is not sufficient

11 Geo. 2,
c. 19, s. 16.

Appeal.
Sect. 17.

In the
metropolis.
3 & 4 Vict.
c. 84, s. 13.

distress upon the premises, any such magistrate may issue a warrant to such constable to put the landlord, lessor, or *agent* into possession. (3 & 4 Vict. c. 84, s. 13.) Every constable to whom such warrant shall be directed must execute and return the same pursuant to the provisions in 2 & 3 Vict. c. 47.

In the city
of London.
11 & 12 Vict.
c. 43, s. 34.

The Lord Mayor and aldermen of London have the same jurisdiction and power as two justices under 11 Geo. 2, c. 19, s. 17 (see *Edwards v. Hodges*, 15 C. B. 477), but not the same as a metropolitan police magistrate under 3 & 4 Vict. c. 84, s. 13 (*supra*), so that they must proceed in like manner as the justices, and cannot send a constable to view premises and affix notices, &c.

By 21 & 22 Vict. c. 73, s. 1, every stipendiary magistrate may do *alone* all acts authorized to be done by two justices.

In proceedings to recover possession of deserted premises under the Act of Geo. 2, no information or complaint on oath is necessary in order to justify the interference of magistrates under that Act. (*Basten v. Carew*, 3 B. & C. 649; 5 D. & R. 558.)

What are
deserted
premises.

Where a tenant ceases to reside on the premises for several months and leaves them without a sufficient distress, they are "deserted" within the meaning of this Act, although a servant be found upon them (*Ex parte Pilton*, 1 B. & Ald. 369; and see *Taylorson v. Peters*, 7 A. & E. 110); but, on the other hand, where the wife and tenant's children remained on the premises, without any furniture except three or four chairs stated to belong to a neighbour, it was held that the premises were not so deserted. (*Ashcroft v. Bourne*, 3 B. & Ad. 684.)

The magistrates should always have a record of their proceedings, under this Act, drawn up, its production being a conclusive answer to an action of trespass against them (see *per* Abbott, C. J., *Basten v. Carew*, 3 B. & C. 649), and a protection to the landlord and constable who assisted in getting possession, even though an appeal has been successful. (*Ashcroft v. Bourne*, 3 B. & Ad. 684; *Reg. v. Sewell*, 8 Q. B. 161.)

APPENDIX (A).

STAMPS.

THE following provisions as to stamp duties are contained in the Schedule to 54 & 55 Vict. c. 39:—

LEASE OR TACK—

(1.) For any definite term not exceeding a year:

Of any dwelling-house or part of a dwelling-house at a £ s. d.
rent not exceeding the rate of 10% per annum 0 0 1

(2.) For any definite term less than a year:

(a.) Of any furnished dwelling-house or apartments where
the rent for such term exceeds 25% 0 2 6

(b.) Of any lands, tenements, or heritable subjects
except or otherwise than as aforesaid

The same
duty as a
lease for a
year at the
rent re-
served for
the definite
term.

(3.) For any other definite term or for any indefinite term:

Of any lands, tenements, or heritable subjects—

Where the consideration, or any part of the consideration,
moving either to the lessor or to any other person,
consists of any money, stock, or security:

In respect of such consideration

The same
duty as a
conveyance
on a sale for
the same
considera-
tion.

Where the consideration or any part of the consideration
is any rent:

In respect of such consideration:

If the rent, whether reserved as a yearly rent or
otherwise, is at a rate or average rate:

	If the term does not ex- ceed 35 years, or is indefinite.	If the term exceeds 35 years, but does not ex- ceed 100 years.	If the term exceeds 100 years.
	£ s. d.	£ s. d.	£ s. d.
Not exceeding 5% per annum	0 0 6	0 3 0	0 6 0
Exceeding—			
5% and not exceeding 10%.	0 1 0	0 6 0	0 12 0
10% „ „ 15%.	0 1 6	0 9 0	0 18 0
15% „ „ 20%.	0 2 0	0 12 0	1 4 0
20% „ „ 25%.	0 2 6	0 15 0	1 10 0
25% „ „ 50%.	0 5 0	1 10 0	3 0 0
50% „ „ 75%.	0 7 6	2 5 0	4 10 0
75% „ „ 100%.	0 10 0	3 0 0	6 0 0
For every full sum of 50%, and also for any fractional part of 50% thereof	0 5 0	1 10 0	3 0 0

(4.) Of any other kind whatsoever not hereinbefore described 0 10 0

The following important provisions are also contained in the Act itself:—

Leases.

Agreements for not more than thirty-five years to be charged as leases.

75.—(1.) An agreement for a lease or tack, or with respect to the letting of any lands, tenements, or heritable subjects for any term not exceeding thirty-five years, or for any indefinite term, is to be charged with the same duty as if it were an actual lease or tack made for the term and consideration mentioned in the agreement.

(2.) A lease or tack made subsequently to, and in conformity with, such an agreement duly stamped is to be charged with the duty of sixpence only.

Leases how to be charged in respect of produce, &c.

76.—(1.) Where the consideration, or any part of the consideration, for which a lease or tack is granted or agreed to be granted, consists of any produce or other goods, the value of the produce or goods is to be deemed a consideration in respect of which the lease or tack or agreement is chargeable with ad valorem duty.

(2.) Where it is stipulated that the value of the produce or goods is to amount at least to, or is not to exceed, a given sum, or where the lessee is specially charged with, or has the option of paying after any permanent rate of conversion, the value of the produce or goods is, for the purpose of assessing the ad valorem duty, to be estimated at the given sum, or according to the permanent rate.

(3.) A lease or tack or agreement for a lease or tack made either wholly or partially for any such consideration, if it contains a statement of the value thereof, and is stamped in accordance with the statement, is, so far as regards the subject-matter of the statement, to be deemed duly stamped, unless or until it is otherwise shown that the statement is incorrect, and that the lease or tack or agreement is in fact not duly stamped.

Directions as to duty in certain cases.

77.—(1.) A lease or tack, or agreement for a lease or tack, or with respect to any letting, is not to be charged with any duty in respect of any penal rent, or increased rent in the nature of a penal rent, thereby reserved or agreed to be reserved or made payable, or by reason of being made in consideration of the surrender or abandonment of any existing lease, tack, or agreement, of or relating to the same subject matter.

(2.) A lease made for any consideration in respect whereof it is chargeable with ad valorem duty, and in further consideration either of a covenant by the lessee to make, or of his having previously made, any substantial improvement of or addition to the property demised to him, or of any covenant relating to the matter of the lease, is not to be charged with any duty in respect of such further consideration.

(3.) No lease for a life or lives not exceeding three, or for a term of years determinable with a life or lives not exceeding three, and no lease for a term absolute not exceeding twenty-one years, granted by an ecclesiastical corporation aggregate or sole, is to be charged with any higher duty than thirty-five shillings.

(4.) A lease for a definite term exceeding thirty-five years granted under the Trinity College (Dublin) Leasing and Perpetuity Act, 1851, is not to be charged with any higher duty than would have

been chargeable thereon if it had been a lease for a definite term not exceeding thirty-five years.

(5.) An instrument whereby the rent reserved by any other instrument chargeable with duty and duly stamped as a lease or tack is increased is not to be charged with duty otherwise than as a lease or tack in consideration of the additional rent thereby made payable.

78.—(1.) The duty upon an instrument chargeable with duty as a lease or tack of—

Duty in certain cases may be denoted by adhesive stamp.

(a) any dwelling-house, or part of a dwelling-house, for a definite term not exceeding a year at a rent not exceeding the rate of ten pounds per annum; or

(b) any furnished dwelling-house or apartments for any definite term less than a year;

and upon the duplicate or counterpart of any such instrument, may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the instrument is first executed.

(2.) Every person who executes, or prepares or is employed in preparing, any such instrument (except letters or correspondence) which is not, at or before the execution thereof, duly stamped shall incur a fine of five pounds.

APPENDIX (B).

46 & 47 VICT. CAP. 61.

*An Act for amending the Law relating to Agricultural Holdings
in England.* [25th August, 1883.]

BE IT ENACTED as follows :

PART I.—IMPROVEMENTS.

Compensation for Improvements.

General right
of tenant to
compensation.

1. Subject as in this Act mentioned, where a tenant has made (a) on his holding any improvement comprised in the first schedule hereto (b) (p. 417), he shall, on and after the commencement of this Act, be entitled on quitting his holding at the determination of a tenancy (pp. 415, 417) to obtain from the landlord as compensation under this Act for such improvement such sum as fairly represents the value of the improvement to an incoming tenant (p. 419): Provided always, that in estimating the value of any improvement in the first schedule hereto there shall not be taken into account as part of the improvement made by the tenant what is justly due to the inherent capabilities of the soil (c).

(a) At any time while he has been tenant of the holding. (See sect. 58.) As "tenant" includes a legatee, &c. (sect. 61), such a person would be entitled, on quitting, to compensation for improvements made by his testator, and would take subject to the liability, if any, to the landlord for waste, &c., committed by the testator. (See *Hawkins v. Hawkins*, 13 Ch. D. 470; 42 L. T. 306; *Re Adams*, 52 L. J., Ch. 758.)

(b) Looking to the enumeration of "improvements" in the first schedule, it is obvious that mere repairs of existing matters will not ordinarily come within the meaning of improvements; though "drainage" might fairly be held to include the opening, cleaning, and relaying of old drains. Repairing fences might come within sect. 34.

By this and the 60th sections the Act is confined to the specific matters mentioned in the schedule. In respect of other away-going rights, such as tillages, seed, labour, and crops, the tenant's rights are still to be ascertained by the contract of the parties or the custom of the country.

(c) This section, as qualified by sect. 6, furnishes the rule to guide the referees and umpire in ascertaining the compensation to be paid to the tenant. The "value to an incoming tenant" will probably be arrived at, as to improvements of the classes mentioned in the first and second parts of the schedule, by ascertaining the increased rental value resulting

from the improvements ; and as to the improvements in the third part of the schedule, by taking the original cost of the improvement, and making a deduction equal to what may be presumed to have been exhausted. The improvements of the third class can hardly be said to represent an increased rental value further than good husbandry in general has that effect. Unless renewed they speedily become exhausted, and the extent to which they have been exhausted will depend very much, in the case of manures, upon the crops which have been taken from the land.

This rule of compensation is only a statutory development of the vague and varying agricultural customs throughout the country by which it has been attempted to secure to an outgoing tenant compensation for labour, seeds, and manure, which had not brought forth their fruit before his tenancy ceased, and for permanent improvements not enjoyed a sufficient length of time to repay him the cost. Hence referees will probably apply to questions of compensation under this Act the rules of valuation which obtained in similar matters under local customs.

Probably no two men will ever agree as to what is "due to the inherent capabilities of the soil" in any particular case.

The Act does not distinguish between compensation for those improvements which are voluntarily undertaken by the tenant in the course of prudent, scientific farming, and those done in pursuance of the tenant's covenant or agreement.

It would be within the inquiry in a reference to ascertain to what extent the improvements were unnecessary.

As to Improvements executed before the Commencement of Act.

2. Compensation under this Act shall not be payable in respect of improvements executed before the commencement of this Act, with the exceptions following, that: Restriction as to improvements before Act.

(1) Where a tenant has within ten years before the commencement of this Act made an improvement mentioned in the third part of the first schedule hereto, and he is not entitled under any contract or custom, or under the Agricultural Holdings (England) Act, 1875, to compensation in respect of such improvement (d) (p. 418); or 38 & 39 Vict. c. 92.

(2) Where a tenant has executed an improvement mentioned in the first or second part of the said first schedule within ten years previous to the commencement of this Act, and he is not entitled under any contract or custom, or under the Agricultural Holdings (England) Act, 1875, to compensation in respect of such improvement, and the landlord within one year after the commencement of this Act declares in writing his consent to the making of such improvement, then such tenant on quitting his holding at the determination of a tenancy after the commencement of this Act may claim compensation under this Act in respect of such improvement in the same manner as if this Act had been in force at the time of the execution of such improvement. (pp. 416, 417.)

(d) If the referees or umpire were satisfied that the improvement was exhausted they would award accordingly.

Not entitled under the Act of 1875 must refer to cases where that Act has been excluded from the contract of tenancy, for the improvements for which compensation was payable under that Act are included in the schedule to this Act.

As to Improvements executed after the Commencement of Act.

Consent of
landlord as
to improve-
ment in first
schedule,
Part I.

3. Compensation under this Act shall not be payable in respect of any improvement mentioned in the first part of the first schedule hereto, and executed after the commencement of this Act, unless the landlord, or his agent duly authorized in that behalf (p. 418), has, previously to the execution of the improvement and after the passing of this Act, consented in writing to the making of such improvement, and any such consent may be given by the landlord unconditionally, or upon such terms as to compensation or otherwise, as may be agreed upon between the landlord and the tenant, and in the event of any agreement being made between the landlord and the tenant, any compensation payable thereunder shall be deemed to be substituted for compensation under this Act (e). (p. 418.)

(e) It seems the agreed compensation may become the subject of a reference under the Act if the tenant ignore the agreement and make a claim. (See sect. 17.)

Notice to
landlord as
to improve-
ment in first
schedule,
Part II.

4. Compensation under this Act shall not be payable in respect of any improvement mentioned in the second part of the first schedule hereto, and executed after the commencement of this Act, unless the tenant has, not more than three months and not less than two months before beginning to execute such improvement, given to the landlord, or his agent duly authorized in that behalf, notice in writing of his intention so to do, and of the manner in which he proposes to do the intended work, and upon such notice being given, the landlord and tenant may agree on the terms as to compensation or otherwise on which the improvement is to be executed, and in the event of any such agreement being made, any compensation payable thereunder shall be deemed to be substituted for compensation under this Act (f), or the landlord may, unless the notice of the tenant is previously withdrawn, undertake to execute the improvement himself, and may execute the same in any reasonable and proper manner which he thinks fit, and charge the tenant with a sum not exceeding 5*l.* per centum per annum on the outlay incurred in executing the improvement (g), or not exceeding such annual sum payable for a period of twenty-five years as will repay such outlay in the said period, with interest at the rate of three per centum per annum, such annual sum to be recoverable as rent (h). In default of any such agreement or undertaking, and also in the event of the landlord failing to comply with his undertaking within a reasonable time, the tenant may execute the improvement himself, and shall in respect thereof be entitled to compensation under this Act.

The landlord and tenant may, if they think fit, dispense with any notice under this section, and come to an agreement in a lease or otherwise between themselves in the same manner and of the same validity as if such notice had been given. (p. 418.)

(f) See note to sect. 3.

(g) The clause in the original bill ended here. It was pointed out that under that provision it would take the landlord twenty years to recoup himself his outlay, by which time the drains would in many cases be filled up, and the draining would have to be done again, so that he would

never get any interest on his outlay. To obviate this drawback, the rest of the clause was added.

(h) This annual sum is not made rent, but only recoverable as rent. It seems doubtful whether the restriction of sect. 44 applies to such annual sum.

5. Where, in the case of a tenancy under a contract of tenancy current at the commencement of this Act, any agreement in writing or custom or the Agricultural Holdings (England) Act, 1875, provides specific compensation for any improvement comprised in the first schedule hereto, compensation in respect of such improvement, although executed after the commencement of this Act, shall be payable in pursuance of such agreement, custom, or Act of Parliament, and shall be deemed to be substituted for compensation under this Act. (p. 418.)

Reservation as to existing and future contracts of tenancy.

Where, in the case of a tenancy under a contract of tenancy beginning after the commencement of this Act, any particular agreement in writing secures to the tenant for any improvement mentioned in the third part of the first schedule hereto, and executed after the commencement of this Act, fair and reasonable compensation (i) (pp. 416, 419), having regard to the circumstances existing at the time of making such agreement, then in such case the compensation in respect of such improvement shall be payable in pursuance of the particular agreement, and shall be deemed to be substituted for compensation under this Act.

The last preceding provision of this section relating to a particular agreement shall apply in the case of a tenancy under a contract of tenancy current at the commencement of this Act in respect of an improvement mentioned in the third part of the first schedule hereto, specific compensation for which is not provided by any agreement in writing, or custom, or the Agricultural Holdings Act, 1875.

In the case of agricultural tenancies the procedure for ascertaining the compensation must be in accordance with this Act, though the measure of compensation is to be ascertained by reference to the Act of 1875, or the agreement of the parties. (*Smith v. Acock*, 53 L. T. 230.)

This section is somewhat obscure. Pending judicial decision, any construction must be accepted with caution. As to the first clause, if the holding is above two acres, the Act of 1875 "*provides* specific compensation" for all the improvements comprised in the first part of the schedule, except Nos. 2 and 14, though the parties may have waived the right to this provision by contract. The first clause does not speak of the tenant being *entitled* to compensation as the second section does, nor of compensation being *secured* to him as the second clause of this section does.

Unnecessary doubt is imported into the second clause by the use of the expression "particular" agreement, an expression which hitherto has had no technical meaning.

(i) The compensation agreed to be paid becomes the subject of a reference by a claim under the Act. (See note to sect. 3.) Although it is not stated who is to determine whether the compensation is "fair and reasonable," and therefore binding upon the tenant, it would seem by implication that the referees or umpire would so decide (see *Richards v. May*, 52 L. J., Q. B. 272; 10 Q. B. D. 400), subject to appeal under sect. 23.

Regulations as to Compensation for Improvements.

Regulations
as to com-
pensation
for improve-
ments.

6. In the ascertainment of the amount of the compensation under this Act payable to the tenant in respect of any improvement there shall be taken into account (*l*) in reduction thereof:

- (a) Any benefit which the landlord has given or allowed to the tenant in consideration of the tenant executing the improvement (p. 420); and
- (b) In the case of compensation for manures (*m*) the value of the manure that would have been produced by the consumption on the holding of any hay, straw, roots, or green crops sold off or removed from the holding within the last two years of the tenancy or other less time for which the tenancy has endured, except as far as a proper return of the manure to the holding has been made in respect of such produce so sold off or removed therefrom (p. 420); and
- (c) Any sums due to the landlord in respect of rent or in respect of any waste (p. 208) committed or permitted (*n*) by the tenant, or in respect of any breach of covenant or other agreement connected with the contract of tenancy (p. 226) committed by the tenant (*o*), also any taxes, rates (*p*), and tithe rent-charge (*q*) due or becoming due in respect of the holding to which the tenant is liable as between him and the landlord. (p. 420.)

There shall be taken into account (*l*) in augmentation of the tenant's compensation:

- (d) Any sum due to the tenant for compensation in respect of a breach of covenant or other agreement (*r*) connected with a contract of tenancy and committed by the landlord. (p. 419.)

Nothing in this section shall enable a landlord to obtain under this Act compensation in respect of waste by the tenant or of breach by the tenant committed or permitted in relation to a matter of husbandry more than four years before the determination of the tenancy.

(*l*) It is not clear to what extent these matters can be "taken into account" unless notice of an intended claim is given in respect thereof under sect. 7. It is submitted that only those matters which are in the nature of substantive claims and counterclaims ((c) and (d)) need be included in the notice, and that those matters ((a) and (b)) which merely go to the *quantum* of compensation for the particular improvement need not be stated in the notice. This distinction is, however, offered with diffidence, and an effort should always be made to let each specific matter with which the referees or umpire are to deal appear in the notice.

(*m*) Manures are defined (sect. 61) as Nos. 22 and 23 in the third part of the first schedule.

(*n*) It seems doubtful whether a tenant is liable for permissive waste. (See *Barnes v. Dowling*, 44 L. T. 809; *ante*, p. 223.)

(*o*) Breach of covenant applies to contracts under seal (*Goodhand v. Ayscough*, 52 L. J., Q. B. 97; 10 Q. B. D. 71); "other agreement" will probably be held to include verbal as well as written contracts "connected with the contract of tenancy"—but not purely collateral contracts.

(*p*) As to the taxes and rates in respect of which landlord and tenant are liable as between themselves in the absence of agreement, see *ante*, p. 261.

(*q*) Tithe rent-charge is now payable by the landlord. (54 Vict. c. 8, *ante*, p. 252.)

(*r*) It seems doubtful whether claims in respect of implied obligations can be included in the reference, *e. g.*, claims for breach of the landlord's implied covenant for quiet enjoyment, or of the tenant's implied obligation to farm in a husbandlike manner.

Procedure.

7. A tenant claiming compensation under this Act shall, two months (*s*) at least before the determination of the tenancy (*t*), give notice in writing to the landlord of his intention to make such claim. (*u*)

Where a tenant gives such notice (*x*), the landlord may, before the determination of the tenancy, or within fourteen days thereafter, give a counter-notice in writing to the tenant of his intention to make a claim in respect of any waste or any breach of covenant or other agreement.

Every such notice and counter-notice shall state, as far as reasonably may be, the particulars and amount of the intended claim. (*y*) (p. 421.)

(*s*) Month in an Act of Parliament means calendar month. (52 & 53 Vict. c. 63, s. 3.)

(*t*) The condition of giving two months' notice before the determination of the tenancy is imperative (see Maxwell on Statutes, 453, 2nd ed.), and the omission to give it in time would be fatal. (*Schofield v. Hincks*, 60 L. T. 573.) The "determination of the tenancy" means the time at which the tenant is bound to give up the last portion of his holding, and where by custom or agreement he remains in occupation of a part, after his term has expired, for the purpose of consuming his hay, straw, &c., he may give notice two months before the time for giving up the portion held over. (*Re Paul, Ex parte Earl of Portarlington*, 24 Q. B. D. 247; 59 L. J., Q. B. 30; *Strang v. Stuart*, 15 Court of Sess., 4th Series, 637.)

If the tenancy is determined by the bankruptcy of the tenant, or by forfeiture under a condition in respect of which there is no relief under sect. 14 of the Conveyancing Act, 1881, the right of compensation will be lost through the provisions of this section as to notice. (And see *Ex parte Dyke, re Morrish*, 48 L. T. 303; 22 Ch. D. 410; 52 L. J., Ch. 570; *Silcock v. Farmer*, 46 L. T. 404; *ante*, p. 407.)

(*u*) The words "intention to make" a claim are misleading; an actual claim should be made, since no other claim is contemplated than the one indicated in this section. To prevent any technical objection to a notice on this point it may be worded thus:—"I hereby give notice that I intend to claim and I do hereby claim compensation pursuant to the provisions of the Agricultural Holdings (England) Act, 1883, in respect of improvements made upon my holding under you, being the Farm, the particulars and amounts of which claim are specified in the schedule hereto." This form may easily be adapted to a counterclaim by the landlord.

The notice should contain sufficient particulars to show that the claim is relevant (*Sinclair v. Clyne's Trustees*, 15 Court of Sess., 4th Series, 185, 191); but a rather informal notice was held sufficient in *Smith v. Acock* (53 L. T. 230; see notice in 77 L. T. Jour. 297.)

(*x*) The landlord cannot initiate proceedings under the Act. If the tenant does not make a claim the landlord's only remedy is by action, or by reference under any special clause in the lease.

It is provided by sect. 57 that the tenant may not claim compensation

otherwise than in accordance with the Act, and if the tenant neglect to claim compensation, and the landlord commence an action against him for rent, breaches of covenant, waste, &c., he will not be entitled to a set-off and counterclaim in respect of his improvements. (*Gaslight and Coke Co. v. Holloway*, 52 L. T. 434; *Schofield v. Hincks*, 58 L. J., Q. B. 147; 60 L. T. 573.)

(y) There is no power in the arbitrator to allow an amendment of particulars. Nor can he by his award exceed the amount claimed. (*Wharton v. Wilson*, 79 L. T. 367.)

On account of the doubt whether two documents can be read together to constitute a notice (*ante*, p. 421), an entirely fresh notice should be served where any mistake or omission is discovered within the time limited for giving notice.

Compensation
agreed or
settled by
reference.

8. The landlord and tenant may agree on the amount and mode and time of payment of compensation to be paid under this Act.

If in any case they do not so agree the difference shall be settled by a reference. (p. 421.)

The functions of the referees and umpire are those of a jury. It seems doubtful whether they have power to deal with any questions of law, but simply to ascertain "the amount and mode and time of payment of compensation," by applying the rules contained in the Act itself.

Instead of a reference under the Act the parties may agree to an ordinary reference, and include in it other questions of away-going rights which cannot be dealt with under the Act, and in that case it will have all the incidents of an ordinary common law reference. (*Shrubbs v. Lee*, 59 L. T. 376.)

The provisions as to arbitration contained in the Act are to be read in connection with the Arbitration Act, 1889 (52 & 53 Vict. c. 49), sect. 24, which applies that Act to every arbitration under any Act passed before or after the commencement of that Act as if the arbitration were pursuant to a submission under that Act, except in so far as the Acts are inconsistent.

Appointment
of referee or
referees and
umpire.

9. Where there is a reference under this Act (z), a referee, or two referees and an umpire, shall be appointed as follows:—

- (1) If the parties concur, there may be a single referee appointed by them jointly: (a)
- (2) If before award the single referee dies or becomes incapable of acting, or for seven days after notice from the parties, or either of them, requiring him to act, fails to act, the proceedings shall begin afresh, as if no referee had been appointed:
- (3) If the parties do not concur in the appointment of a single referee, each of them shall appoint a referee: (b) (p. 422)
- (4) If before award one of two referees dies or becomes incapable of acting, or for seven days after notice from either party requiring him to act, fails to act, the party appointing him shall appoint another referee:
- (5) Notice of every appointment of a referee by either party shall be given to the other party: (c)
- (6) If for fourteen days after notice by one party to the other to appoint a referee, or another referee, the other party fails to do so, then, on the application of the party giving notice, the

county court shall, within fourteen days, appoint a competent and impartial person to be a referee:

- (7) Where two referees are appointed, then (subject to the provisions of this Act) they shall, before they enter on the reference, appoint an umpire: (d)
- (8) If before award an umpire dies or becomes incapable of acting, the referees shall appoint another umpire: (e)
- (9) If for seven days after request from either party the referees fail to appoint an umpire, or another umpire, then, on the application of either party, the county court (f) shall, within fourteen days, appoint a competent and impartial person to be the umpire: (p. 422)
- (10) Every appointment, notice, and request under this section shall be in writing. (g)

(z) Matters capable of being referred under the Act are questions as to compensation, as to the value of fixtures under sect. 34, and as to reduction of rent under sect. 41.

(a) It is the duty of the parties to attempt to concur in appointing a single referee, before either party nominates a separate referee. (See *Yates v. Mayor of Blackburn*, 29 L. J., Ex. 447; 6 H. & N. 61.) The appointment of two referees only adds to the expense, as they almost invariably disagree, leaving the matter to be dealt with by the umpire. The award of an umpire will not, however, be bad, because no effort has been made to appoint a single referee. (*Eagle v. Charing Cross Rail. Co.*, 36 L. J., C. P. 297; L. R., 2 C. P. 638.) If, instead of agreeing upon a single referee, the parties agree that two persons named by them shall appoint a referee, this would not seem to be a reference under the Act. (See *Martin v. Leicester Waterworks Co.*, 27 L. J., Ex. 432; 3 H. & N. 463.)

(b) The referees should be impartial persons not connected with or employed by either party. If there is a valid objection to a referee on the ground of his unfitness, it is not waived by the party objecting to him continuing to attend before him, provided he do so under protest. (*Ringland v. Lowndes*, 33 L. J., C. P. 337; 17 C. B., N. S. 514; *Davies v. Price*, 34 L. J., Q. B. 8; *Sheonath v. Ramnath*, 35 L. J., P. C. 1.) The objecting party would, however, be justified in retiring from the reference (*Re Elliott and South Devon Rail. Co.*, 2 De G. & Sm. 17), but the more proper course would be to apply to the High Court for an order to restrain the referee from acting. (*Malmesbury Rail. Co. v. Budd*, 45 L. J., Ch. 271; 2 Ch. D. 113; *Beddow v. Beddow*, 47 L. J., Ch. 588; 9 Ch. D. 89.)

The landlord does not, by appointing a referee under protest, admit that the case is one entitling the tenant to compensation. (*Sutton Harbour Improvement Co. v. Hitchens*, 1 De G., M. & G. 161.)

(c) See sect. 28, as to service of notice. The notice must be after the appointment has been made, and must state that it has been made, and not that it is going to be made. (*Bradley v. London and North Western Rail Co.*, 5 Ex. 769.) The appointment is not complete until it is communicated to the other side. (*Tew v. Harris*, 17 L. J., Q. B. 1.)

(d) Where the referees are to appoint, they must do so before they can do anything else in the reference (*Bright v. Durnell*, 4 Dow. 756), except enlarge their time under sect. 16. (See *Cudliff v. Walters*, 2 M. & R. 232.) It is not free from doubt whether, if the referees fail to award within the time limited to them, so that "their authority shall cease," under sect. 18, they have not still power to appoint an umpire. (See *Re Bradshaw*, 12 Q. B. 562; 17 L. J., Q. B. 362; *Holdsworth v. Barsham*, 31 L. J., Q. B. 145; 32 *ib.* 289; 4 B. & S. 1.)

If the umpire is appointed under sect. 10, the appointment is not a condition precedent to the referees entering upon the reference.

The appointment of the umpire must be the act of the will and judgment of both referees. He must not be selected by lot. (Redman, Arb. 103.)

(e) The oversight in the Lands Clauses Consolidation Act, 1845, s. 27, is here repeated. No provision is made in case the umpire should refuse to act. It should, therefore, be ascertained, before appointing him, that he is willing to act, otherwise the reference may come to a standstill.

(f) See sects. 11 and 61.

(g) Mode of service, see sect. 28.

Requisition
for appoint-
ment of
umpire by
Land Com-
missioners,
&c.

10. Provided that, where two referees are appointed, an umpire may be appointed as follows:

(1) If either party, on appointing a referee, requires, by notice in writing to the other, that the umpire shall be appointed by the Land Commissioners for England, then the umpire, and any successor to him, shall be appointed, on the application of either party, by those commissioners. (h)

(2) In every other case, if either party, on appointing a referee, requires, by notice in writing to the other, that the umpire shall be appointed by the county court, then, unless the other party dissents by notice in writing therefrom, the umpire, and any successor to him, shall on the application of either party be so appointed, and in case of such dissent the umpire, and any successor to him, shall be appointed, on the application of either party, by the Land Commissioners for England. (p. 422.)

(h) The powers of the Land Commissioners under this Act are now transferred to the Board of Agriculture (52 & 53 Vict. c. 30, s. 2), and the appointment of umpire should be under the seal of the Board. (Sect. 6.)

The umpire need not be appointed either by the county court or the Board of Agriculture before the referees enter upon the reference. (*Smith v. Acock*, 77 L. T. Jour. 298; 78 *ib.* 45.)

Exercise of
powers of
county court.

11. The powers of the county court under this Act relative to the appointment of a referee or umpire shall be exercisable by the judge of the Court having jurisdiction (i), whether he is without or within his district, and may, by consent of the parties, be exercised by the registrar of the Court. (k) (p. 422.)

(i) The judge of the district in which the holding or larger part thereof is situate. (Sect. 61.)

(k) The application is by summons. It is a seven days' summons, except by consent. (C. C. R. 1889, Ord. XL. r. 7.)

Mode of
submission
to reference.

12. The delivery to a referee of his appointment shall be deemed a submission to a reference by the party delivering it; and neither party shall have power to revoke a submission, or the appointment of a referee, without the consent of the other. (p. 422.)

The submission is not complete until notice of the appointment has been given to the other side. (See note (c) to sect. 9.) Until that is done, the appointment of a referee may, it is submitted, be cancelled.

Power for
referee, &c.

13. The referee or referees or umpire may call for the production of any sample, or voucher, or other document, or other evidence

which is in the possession or power of either party, or which either party can produce (*l*), and which to the referee or referees or umpire seems necessary for determination of the matters referred, and may take the examination of the parties and witnesses on oath, and may administer oaths and take affirmations (*m*); and if any person so sworn or affirming wilfully and corruptly gives false evidence he shall be guilty of perjury. (p. 422.)

to require
production of
documents,
administer
oaths, &c.

Each party must have a fair opportunity of putting his case, and the evidence in support of it, before the arbitrators. If the parties agree that the referees or umpire shall determine the matters without calling witnesses, there is no objection to that course being taken, but if either party require the reference to be conducted in the ordinary way, the referees or umpire have no power to conduct it otherwise. (*Bottomley v. Ambler*, 38 L. T. 545; 26 W. R. 566.) In that event the mode of proceeding in the reference will, as near as may, be the same as in a trial at *nisi prius*.

(*l*) By the united operation of sects. 8 and 24 of the Arbitration Act, 1889 (52 & 53 Vict. c. 49), any party may sue out a writ of subpoena to compel the attendance of witnesses. The writ issues at the writ department of the central office, as of course.

(*m*) It is not absolutely necessary that the evidence should be taken upon oath or affirmation, but it is the ordinary practice, and should not be departed from without the consent of the parties. (*Wakefield v. Llanelly Rail. Co.*, 34 Beav. 245.)

It seems matter of regret that power is not given to the referees and umpire to state a case for the opinion of a Superior Court, instead of the matter being required to percolate through the county court, in order to have it stated under sect. 23. Though apparently power is now given to the referees or umpire to state a case by the Arbitration Act, 1889. (*Ante*, p. 422.)

14. The referee or referees or umpire may proceed in the absence of either party where the same appears to him or them expedient, after notice given to the parties. (p. 423.)

Power to
proceed in
absence.

The notice should state that the referees or umpire will proceed *ex parte*, if either of the parties fail to attend. (*Gladwin v. Chilcote*, 9 Dow, 550.) If either of the parties after such a notice require delay, they should appeal to the referees or umpire, stating the ground on which it is required; if the ground is reasonable, the delay will be granted. (*Solomon v. Solomon*, 28 L. J., Ex. 129; *Re Hewitt and Portsmouth Waterworks Co.*, 10 W. R. 780.)

15. The award shall be in writing, signed by the referee or referees or umpire. (p. 423.)

Form of
award.

The matters which by sect. 19 are required to be set out in the award necessitate great care in drafting that document.

The solicitor of either of the parties should not be employed to prepare the award. (*Re Underwood and Bedford and Cambridge Rail. Co.*, 31 L. J., C. P. 10; 11 C. B., N. S. 442.)

If the award is that of the referees, it must be signed by both at the same time and place, and in the presence of each other. (*Wade v. Dowling*, 23 L. J., Q. B. 302; 4 E. & B. 44; *Eads v. Williams*, 24 L. J., Ch. 531.)

16. A single referee shall make his award ready for delivery (*n*) within twenty-eight days after his appointment (*o*).

Time for
award of

referee or referees.

Two referees shall make their award ready for delivery within twenty-eight days after the appointment of the last appointed of them (*o*), or within such extended time (if any) as they from time to time (*p*) jointly fix by writing under their hands, so that they make their award ready for delivery within a time not exceeding in the whole forty-nine days after the appointment of the last appointed of them. (p. 423.)

(*n*) As soon as an award is made it is "ready for delivery," which means, delivery on request. (*Robison v. Calwood*, 6 Mod. 82; *Freeman v. Bernard*, 1 Ld. Raym. 247; *Veale v. Warner*, 1 Wms. Saund. 327b.)

(*o*) In reckoning the time, the day of his appointment is not to be included. (*Re Higham and Jessop*, 9 Dow, 203.)

(*p*) The time must be extended during the time previously fixed for making their award, otherwise their authority will have expired, and the extension will be a nullity.

Award in respect of compensation under sects. 3, 4, and 5.

17. In any case provided for by sects. 3, 4, or 5, if compensation is claimed under this Act, such compensation as under any of those sections is to be deemed to be substituted for compensation under this Act, if and so far as the same can, consistently with the terms of the agreement, if any, be ascertained by the referees or the umpire, shall be awarded in respect of any improvements thereby provided for, and the award shall, when necessary, distinguish such improvements and the amount awarded in respect thereof; and an award given under this section shall be subject to the appeal provided by this Act.

The intention of this section seems to be, that every agreement made under sects. 3, 4, and 5 shall be construed as if the procedure clauses of the Act were incorporated therewith. (See *Smith v. Acock*, 53 L. T. 230, and note to sect. 5.) The agreement might contract the parties out of this section by containing a special arbitration clause.

Reference to and award by umpire.

18. Where two referees are appointed and act (*q*), if they fail to make their award ready for delivery within the time aforesaid, then, on the expiration of that time, their authority shall cease, and thereupon the matters referred to them shall stand referred to the umpire. (*r*)

The umpire shall make his award ready for delivery (*s*) within twenty-eight days after notice in writing given to him by either party or referee of the reference to him, or within such extended time (if any) as the registrar of the county court from time to time appoints, on the application of the umpire or of either party, made before the expiration of the time appointed by or extended under this section. (*t*) (p. 423.)

Sects. 17 to 19 seem to have got transposed. In natural order the 18th should follow the 16th, and the 17th should follow the 19th.

(*q*) It appears that the referees must "act," and fail to award before the authority of the umpire arises. If they fail to act, fresh referees must be appointed under sect. 9.

(*r*) The duty of the umpire when he acts is to decide upon the whole of the matters in difference, and not merely any particular point upon which the referees may have disagreed.

(*s*) See note (*n*) to sect. 16.

(*t*) By consent the time could be extended without any application to the Court. (See *Palmer v. Metropolitan Rail. Co.*, 31 L. J., Q. B. 259.)

19. The award shall not award a sum generally for compensation, but shall, so far as possible, specify:

Award to give particulars.

- (a) The several improvements, acts, and things in respect whereof compensation is awarded, and the several matters and things taken into account under the provisions of this Act in reduction or augmentation of such compensation;
- (b) The time at which each improvement, act, or thing was executed, done, committed, or permitted;
- (c) The sum awarded in respect of each improvement, act, matter, and thing; and
- (d) Where the landlord desires to charge his estate with the amount of compensation found due to the tenant, the time at which, for the purposes of such charge, each improvement, act, or thing in respect of which compensation is awarded is to be deemed to be exhausted. (u) (p. 423.)

(u) The Act supplies no rule for ascertaining when improvements are to be deemed exhausted, as did the Act of 1875. Where, however, the landlord intends to obtain a charge upon the holding under sect. 29, he should make a specific request to the referees or umpire to make a declaration upon the point in the award. If no such request is made, the award would not be subject to be impeached for the omission.

20. The costs of and attending the reference (x), including the remuneration of the referee or referees and umpire, where the umpire has been required to act (y), and including other proper expenses, shall be borne and paid by the parties in such proportion as to the referee or referees or umpire appears just (p. 423), regard being had to the reasonableness or unreasonableness of the claim of either party in respect of amount, or otherwise, and to all the circumstances of the case.

Costs of reference.

The award may direct the payment of the whole or any part of the costs aforesaid by the one party to the other.

The costs aforesaid shall be subject to taxation by the registrar of the county court, on the application of either party, but that taxation shall be subject to review by the judge of the county court. (p. 423.)

(x) Not costs prior to the reference.

(y) The referees and umpire are entitled to retain their award until their fees are paid, and this notwithstanding their charges are subject to taxation.

21. The award shall fix a day, not sooner than one month after the delivery of the award (z), for the payment of money awarded for compensation, costs, or otherwise. (p. 423.)

Day for payment.

(z) That is, one calendar month after the award is actually delivered to one of the parties, not from the time it is ready for delivery. It is usual when the award is taken up by the one party to send a plain copy to the other party. This should always be done, to enable the person who does not take up the award to appeal if necessary.

22. A submission or award shall not be made a rule of any Court, or be removable by any process into any Court, and an award shall

Submission not to be removable, &c.

not be questioned otherwise than as provided by this Act. (a) (p. 423.)

(a) But see *ante*, p. 421.

Appeal to
county court.

23. Where the sum claimed for compensation exceeds 100*l.* (b), either party may, within seven days after delivery of the award (c), appeal against it to the judge of the county court on all or any of the following grounds :

1. That the award is invalid ;
2. That the award proceeds wholly or in part upon an improper application of or upon the omission properly to apply the special provisions of sects. 3, 4, or 5 of this Act ;
3. That compensation has been awarded for improvements, acts, or things, breaches of covenants or agreements, or for committing or permitting waste, in respect of which the party claiming was not entitled to compensation ;
4. That compensation has not been awarded for improvements, acts, or things, breaches of covenants or agreements, or for committing or permitting waste, in respect of which the party claiming was entitled to compensation ;

and the judge shall hear and determine the appeal, and may, in his discretion, remit the case to be reheard as to the whole or any part thereof by the referee or referees or umpire, with such directions as he may think fit.

If no appeal is so brought, the award shall be final.

The decision of the judge of the county court on appeal shall be final, save that the judge shall, at the request of either party, state a special case on a question of law for the judgment of the High Court of Justice (d) (p. 424), and the decision of the High Court on the case, and respecting costs and any other matter connected therewith, shall be final, and the judge of the county court shall act thereon.

(b) The amount of the claim, not the sum awarded, governs the right of appeal. (*Ante*, p. 423.)

For the procedure on an appeal, see O. C. Rules, 1889, Ord. XL., *ante*, p. 424.

(c) See note (z) to sect. 21.

(d) It is compulsory upon the judge to state a case upon a point of law if required. As to the power of a referee or umpire to state a case, see *ante*, p. 422, and note (m) to sect. 12.

Recovery of
compensation.

24. Where any money agreed or awarded or ordered on appeal to be paid for compensation, costs, or otherwise, is not paid within fourteen days after the time when it is agreed or awarded or ordered to be paid, it shall be recoverable, upon order made by the judge of the county court, as money ordered by a county court under its ordinary jurisdiction to be paid is recoverable. (p. 425.)

This does not apply where the landlord is a trustee, or receives the rent otherwise than for his own benefit. In such a case the compensation is recoverable under sect. 31.

Appointment
of guardian.

25. Where a landlord or tenant is an infant without a guardian, or is of unsound mind, not so found by inquisition, the county court, on the application of any person interested, may appoint a guardian

of the infant or person of unsound mind for the purposes of this Act, and may change the guardian if and as occasion requires.

26. Where the appointment of a person to act as the next friend of a married woman is required (e) for the purposes of this Act, the county court may make such appointment, and may remove or change that next friend if and as occasion requires.

Provisions
respecting
married
women.

A woman married before the commencement of the Married Women's Property Act, 1882 (f), entitled for her separate use to land, her title to which accrued before such commencement as aforesaid, and not restrained from anticipation, shall, for the purposes of this Act, be in respect of land as if she was unmarried.

45 & 46 Vict.
c. 75.

Where any other woman married before the commencement of the Married Women's Property Act, 1882 (f), is desirous of doing any act under this Act in respect of land, her title to which accrued before such commencement as aforesaid, her husband's concurrence shall be requisite, and she shall be examined apart from him by the county court, or by the judge of the county court for the place where she for the time being is, touching her knowledge of the nature and effect of the intended act, and it shall be ascertained that she is acting freely and voluntarily.

(e) It is not very obvious when a next friend is required. If she is acting in respect of her separate property she can act alone; if it is not her separate property her husband must concur, but in neither case is a next friend necessary.

If the married woman is an infant, sect. 25 applies, and a guardian should be appointed.

(f) 1st January, 1883.

27. The costs of proceedings in the county court under this Act shall be in the discretion of the Court. (p. 424.)

Costs in
county court.

The Lord Chancellor may from time to time prescribe a scale of costs for those proceedings, and of costs to be taxed by the registrar of the Court.

28. Any notice, request, demand, or other instrument under this Act may be served on the person to whom it is to be given, either personally or by leaving it for him at his last known place of abode in England, or by sending it through the post in a registered letter addressed to him there; and if so sent by post it shall be deemed to have been served at the time when the letter containing it would be delivered in ordinary course; and in order to prove service by letter it shall be sufficient to prove that the letter was properly addressed and posted, and that it contained the notice, request, demand, or other instrument to be served.

Service of
notice, &c.

This does not appear to apply to a notice to quit given under sect. 33. That section merely lengthens the common law notice in certain cases, and a notice to quit is not a notice under this Act.

Charge of Tenant's Compensation.

29. A landlord, on paying to the tenant the amount due to him in respect of compensation under this Act, or in respect of compensation authorized by this Act to be substituted for compensation

Power for
landlord on
paying com-

pensation to obtain charge. under this Act, or on expending such amount as may be necessary to execute an improvement under the second part of the first schedule hereto, after notice given by the tenant of his intention to execute such improvement in accordance with this Act, shall be entitled to obtain from the county court a charge(*g*) on the holding, or any part thereof, to the amount of the sum so paid or expended. (p. 425.)

The Court shall, on proof of the payment or expenditure, and on being satisfied of the observance in good faith by the parties of the conditions imposed by this Act, make an order charging the holding, or any part thereof, with repayment of the amount paid or expended, with such interest, and by such instalments, and with such directions for giving effect to the charge, as the Court thinks fit.

But, where the landlord obtaining the charge is not absolute owner of the holding for his own benefit, no instalment or interest shall be made payable after the time when the improvement in respect whereof compensation is paid will, where an award has been made, be taken to have been exhausted according to the declaration of the award, and in any other case after the time when any such improvement will, in the opinion of the Court, after hearing such evidence (if any) as it thinks expedient(*h*), have become exhausted.

The instalments and interest shall be charged in favour of the landlord, his executors, administrators, and assigns.

The estate or interest of any landlord holding for an estate or interest determinable or liable to forfeiture by reason of his creating or suffering any charge thereon shall not be determined or forfeited by reason of his obtaining a charge under this Act, anything in any deed, will, or other instrument to the contrary thereof notwithstanding.

45 & 46 Vict.
c. 38.

[*First.]

Capital money arising under the Settled Land Act, 1882(*i*), may be applied in payment of any moneys expended and costs incurred by a landlord under or in pursuance of this Act in or about the execution of any improvement mentioned in the first or second parts of the* schedule hereto, as for an improvement authorized by the said Settled Land Act(*k*); and such money may also be applied in discharge of any charge created on a holding under or in pursuance of this Act in respect of any such improvement as aforesaid, as in discharge of an incumbrance authorized by the said Settled Land Act to be discharged out of such capital money. (p. 426.)

Apart from the provisions of this Act the landlord for the time being is liable to pay the tenant for any improvements or away-going rights to which the tenant is entitled. Where the landlord is only a tenant for life he is not entitled to a charge upon the property or to be indemnified by the remainderman for any payments made for unexhausted improvements. (*Mansel v. Norton*, 52 L. J., Ch. 357; 22 Ch. D. 769.) This will be still the liability of a tenant for life unless he obtains a charging order under this Act, the effect of which will enable him to raise the amount by a charge, which will extend the liability to pay to the landlord for the time being until the improvements are exhausted.

Where a tenant for life was landlord, and he died before paying the amount due for compensation under the Act, his executors were held to

be entitled to a charge under this section. (*Gough v. Gough*, [1891] 2 Q. B. 665; 60 L. J., Q. B. 726; 65 L. T. 110.)

(g) See note (l) to sect. 30. The charge must be registered under the Land Charges Registration and Searches Act, 1888. (51 & 52 Vict. c. 51, ss. 4, 10.)

(h) Probably the certificate of the referees or umpire would be accepted by the Court as sufficient evidence.

(i) As to what are capital moneys under the Act, see Wolst. & Tu. S. L. A. 80.

(k) See sect. 25 of S. L. A. 1882.

For charges under this Act the forms in the schedules to the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), will be found a convenient guide. Forms of charges.

30. The sum charged by the order of a county court under this Act shall be a charge (l) on the holding, or the part thereof charged, for the landlord's interest therein, and for all interests therein subsequent to that of the landlord (m); but so that the charge shall not extend beyond the interest of the landlord, his executors, administrators, and assigns, in the tenancy where the landlord is himself a tenant of the holding. (p. 426.) Incidence of charge.

(l) Under the Conveyancing Act, 1881 (44 & 45 Vict. c. 41, s. 2, sub-s. 6), "charge" is included in the definition of a mortgage, and the holder of a charge under this Act would have the powers of a mortgagee under the Conveyancing Act.

(m) That is to say, it is a liability attaching to the land like a covenant running with the land: but it is not a very clear way of saying it.

31. Where the landlord is a person entitled to receive the rents and profits of any holding as trustee, or in any character otherwise than for his own benefit, the amount due from such landlord in respect of compensation under this Act, or in respect of compensation authorized by this Act to be substituted for compensation under this Act, shall be charged and recovered as follows, and not otherwise; (that is to say,) Provision in case of trustee.

(1) The amount so due shall not be recoverable personally against such landlord, nor shall he be under any liability to pay such amount, but the same shall be a charge on and recoverable against the holding only. (p. 425.)

(2) Such landlord shall, either before or after having paid to the tenant the amount due to him, be entitled to obtain from the county court a charge on the holding to the amount of the sum required to be paid or which has been paid, as the case may be, to the tenant.

(3) If such landlord neglect or fail within one month after the tenant has quitted his holding to pay to the tenant the amount due to him, then after the expiration of such one month the tenant shall be entitled to obtain from the county court in favour of himself, his executors, administrators, and assigns, a charge on the holding to the amount of the sum due to him, and of all costs properly incurred by him in obtaining the charge or in raising the amount due thereunder.

(4) The Court shall, on proof of the tenant's title to have a charge made in his favour, make an order charging the holding with payment of the amount of the charge, including costs,

in like manner and form as in case of a charge which a landlord is entitled to obtain.

Where compensation for improvements comprised in Part 1 or 2 of the schedule is charged by an order under this section, the charge must be registered under the Land Charges Registration and Searches Act, 1888. (53 & 54 Vict. c. 57, s. 3.)

Advance
made by a
company.

32. Any company now or hereafter incorporated by Parliament, and having power to advance money for the improvement of land, may take an assignment of any charge made by a county court under the provisions of this Act, upon such terms and conditions as may be agreed upon between such company and the person entitled to such charge; and such company may assign any charge so acquired by them to any person or persons whomsoever. (p. 425.)

Notice to Quit.

Time of notice
to quit.

33. Where a half-year's notice, expiring with a year of tenancy, is by law necessary (*n*) and sufficient for determination of a tenancy from year to year, in the case of any such tenancy under a contract of tenancy made either before or after the commencement of this Act, a year's notice so expiring shall by virtue of this Act be necessary and sufficient for the same, unless the landlord and tenant of the holding, by writing under their hands, agree that this section shall not apply, in which case a half-year's notice shall continue to be sufficient (pp. 4, 380); but nothing in this section shall extend to a case where the tenant is adjudged bankrupt, or has filed a petition for a composition or arrangement with his creditors.

(*n*) By law, means, by implication of law, necessary, so that the section is restricted to those cases where there has been no stipulation as to length of notice, and if half a year's notice is expressly stipulated for, it will be sufficient, and the Act will not apply. (*Barlow v. Teal*, 15 Q. B. D. 501; 54 L. J., Q. B. 564; and see *ante*, p. 4.)

Fixtures.

Tenant's
property in
fixtures,
machinery,
&c.

34. Where after the commencement of this Act a tenant affixes to his holding any engine, machinery, fencing, or other fixture, or erects any building for which he is not under this Act or otherwise entitled to compensation, and which is not so affixed or erected in pursuance of some obligation in that behalf or instead of some fixture or building belonging to the landlord, then such fixture or building shall be the property of and be removable by the tenant before or within a reasonable time after the termination of the tenancy. (p. 396.)

Provided as follows:

1. Before the removal of any fixture or building the tenant shall pay all rent owing by him, and shall perform or satisfy all other his obligations to the landlord in respect to the holding:
2. In the removal of any fixture or building the tenant shall not do any avoidable damage to any other building or other part of the holding:

3. Immediately after the removal of any fixture or building the tenant shall make good all damage occasioned to any other building or other part of the holding by the removal :
4. The tenant shall not remove any fixture or building without giving one month's previous notice in writing to the landlord of the intention of the tenant to remove it :
5. At any time before the expiration of the notice of removal the landlord, by notice in writing given by him to the tenant, may elect to purchase any fixture or building comprised in the notice of removal, and any fixture or building thus elected to be purchased shall be left by the tenant, and shall become the property of the landlord, who shall pay the tenant the fair value thereof to an incoming tenant of the holding ; and any difference as to the value shall be settled by a reference under this Act, as in case of compensation (but without appeal).
(pp. 397, 421.)

Crown and Duchy Lands.

35. This Act shall extend and apply to land belonging to her Majesty the Queen, her heirs and successors, in right of the Crown. Application of Act to Crown lands.

With respect to such land, for the purposes of this Act, the commissioners of her Majesty's woods, forests, and land revenues, or one of them, or other the proper officer or body having charge of such land for the time being, or in case there is no such officer or body, then such person as her Majesty, her heirs or successors, may appoint in writing under the royal sign manual, shall represent her Majesty, her heirs and successors, and shall be deemed to be the landlord.

Any compensation payable under this Act by the commissioners of her Majesty's woods, forests, and land revenues, or either of them, in respect of an improvement mentioned in the first or second part of the first schedule hereto, shall be deemed to be payable in respect of an improvement of land within sect. 1 of the Crown Lands Act, 1866, and the amount thereof shall be charged and repaid as in that section provided with respect to the costs, charges, and expenses therein mentioned.

Any compensation payable under this Act by those commissioners, or either of them, in respect of an improvement mentioned in the third part of the first schedule hereto, shall be deemed to be part of the expenses of the management of the land revenues of the Crown, and shall be payable to those commissioners out of such money and in such manner as the last-mentioned expenses are by law payable.

36. This Act shall extend and apply to land belonging to her Majesty, her heirs and successors, in right of the Duchy of Lancaster. Application of Act to land of Duchy of Lancaster.

With respect to such land, for the purposes of this Act, the chancellor for the time being of the duchy shall represent her Majesty, her heirs and successors, and shall be deemed to be the landlord.

The amount of any compensation payable under this Act by the chancellor of the duchy in respect of an improvement mentioned in the first or second part of the first schedule to this Act shall be

deemed to be an expense incurred in improvement of land belonging to her Majesty, her heirs or successors, in right of the duchy, within sect. 25 of the Act of the 57th year of King George the Third, c. 97, and shall be raised and paid as in that section provided with respect to the expenses therein mentioned.

The amount of any compensation payable under this Act by the chancellor of the duchy in respect of an improvement mentioned in the third part of the first schedule to this Act shall be paid out of the annual revenues of the duchy.

Application of
Act to land
of Duchy of
Cornwall.

37. This Act shall extend and apply to land belonging to the Duchy of Cornwall.

With respect to such land, for the purposes of this Act, such person as the Duke of Cornwall for the time being, or other the personage for the time being entitled to the revenues and possessions of the Duchy of Cornwall, from time to time, by sign manual, warrant, or otherwise, appoints, shall represent the Duke of Cornwall or other the personage aforesaid, and be deemed to be the landlord, and may do any act or thing under this Act which a landlord is authorized or required to do thereunder.

Any compensation payable under this Act by the Duke of Cornwall, or other the personage aforesaid, in respect of an improvement mentioned in the first or second part of the first schedule to this Act shall be deemed to be payable in respect of an improvement of land within sect. 8 of the Duchy of Cornwall Management Act, 1863, and the amount thereof may be advanced and paid from the money mentioned in that section, subject to the provision therein made for repayment of sums advanced for improvements.

Ecclesiastical and Charity Lands.

Landlord,
archbishop
or bishop.

38. Where lands are assigned or secured as the endowment of a see, the powers by this Act conferred on a landlord shall not be exercised by the archbishop or bishop, in respect of those lands, except with the previous approval in writing of the estates committee of the ecclesiastical commissioners for England. (p. 425.)

Landlord
incumbent
of benefice.

39. Where a landlord is incumbent of an ecclesiastical benefice, the powers by this Act conferred on a landlord shall not be exercised by him in respect of the glebe land or other land belonging to the benefice, except with the previous approval in writing of the patron of the benefice, that is, the person, officer, or authority who, in case the benefice were vacant, would be entitled to present thereto, or of the governors of Queen Anne's bounty (that is, the governors of the bounty of Queen Anne for the augmentation of the maintenance of the poor clergy.)

In every such case the governors of Queen Anne's bounty may, if they think fit, on behalf of the incumbent, out of any money in their hands, pay to the tenant the amount of compensation due to him under this Act; and thereupon they may, instead of the incumbent, obtain from the county court a charge on the holding, in respect thereof, in favour of themselves.

Every such charge shall be effectual, notwithstanding any change of the incumbent. (p. 425.)

40. The powers by this Act conferred on a landlord in respect of Landlord, charging the land shall not be exercised by trustees for ecclesiastical charity or charitable purposes, except with the previous approval in writing trustees, &c. of the charity commissioners for England and Wales. (p. 425.)

Resumption for Improvements, and Miscellaneous.

41. Where on a tenancy from year to year a notice to quit is given by the landlord with a view to the use of land for any of the following purposes:—

Resumption of possession for cottages, &c.

The erection of farm labourers' cottages or other houses, with or without gardens;

The providing of gardens for existing farm labourers' cottages or other houses;

The allotment for labourers of land for gardens or other purposes;

The planting of trees;

The opening or working of any coal, ironstone, limestone, or other mineral, or of a stone quarry, clay, sand, or gravel pit, or the construction of any works or buildings to be used in connection therewith;

The obtaining of brick earth, gravel, or sand;

The making of a watercourse or reservoir;

The making of any road, railway, tramroad, siding, canal, or basin, or any wharf, pier, or other work connected therewith; and the notice to quit so states, then it shall, by virtue of this Act, be no objection to the notice (n) that it relates to part only of the holding. (p. 384.)

In every such case the provisions of this Act respecting compensation shall apply as on determination of a tenancy in respect of an entire holding.

The tenant shall also be entitled to a proportionate reduction of rent in respect of the land comprised in the notice to quit, and in respect of any depreciation of the value to him of the residue of the holding, caused by the withdrawal of that land from the holding or by the use to be made thereof (pp. 275, 384), and the amount of that reduction shall be ascertained by agreement or settled by a reference under this Act, as in case of compensation (but without appeal). (o) (p. 422.)

The tenant shall further be entitled, at any time within twenty-eight days after service of the notice to quit, to serve on the landlord a notice in writing to the effect that he (the tenant) accepts the same as a notice to quit the entire holding, to take effect at the expiration of the then current year of tenancy; and the notice to quit shall have effect accordingly. (p. 384.)

There is no power to resume possession of land held for a term of years.

(n) The notice to quit to be valid must state the purpose for which the portion of land to which it relates is required.

(o) It would not generally be necessary to call witnesses for this purpose (*Bottomley v. Ambler*, 38 L. T. 545; 26 W. R. 566), unless some extraordinary claim were set up as to depreciation of the residue of the holding.

Provision as to limited owners.

42. Subject to the provisions of this Act in relation to crown, duchy, ecclesiastical, and charity lands, a landlord, whatever may be his estate or interest in his holding, may give any consent, make any agreement, or do or have done to him any act in relation to improvements in respect of which compensation is payable under this Act which he might give or make or do or have done to him if he were, in the case of an estate of inheritance, owner thereof in fee, and in the case of a leasehold, possessed of the whole estate in the leasehold. (p. 425.)

Provision in case of reservation of rent.

43. When, by any Act of Parliament, deed, or other instrument, a lease of a holding is authorized to be made, provided that the best rent, or reservation in the nature of rent, is by such lease reserved, then, whenever any lease of a holding is, under such authority, made to the tenant of the same, it shall not be necessary, in estimating such rent or reservation, to take into account against the tenant the increase (if any) in the value of such holding arising from any improvements made or paid for by him on such holding. (p. 37.)

This is a common restriction in leasing powers in instruments, and the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 7 (*ante*, p. 36), is a familiar instance of it in an Act of Parliament. As to the meaning of "best rent," see *ante*, p. 28; Farwell, Powers, 614.

PART II.—DISTRESS.

Limitation of distress in respect of amount and time.

44. After the commencement of this Act it shall not be lawful for any landlord entitled to the rent of any holding to which this Act applies, to distrain for rent (*p*) which became due in respect of such holding more than one year before the making of such distress (p. 278), except in the case of arrears of rent in respect of a holding to which this Act applies existing at the time of the passing of this Act (*q*), which arrears shall be recoverable by distress up to the 1st day of January, 1885, to the same extent as if this Act had not passed. (*r*)

Provided that where it appears that according to the ordinary course of dealing between the landlord and tenant of a holding the payment of the rent of such holding has been allowed to be deferred until the expiration of a quarter of a year or half a year after the date at which such rent legally became due (*s*), then for the purpose of this section the rent of such holding shall be deemed to have become due at the expiration of such quarter or half-year as aforesaid, as the case may be, and not at the date at which it legally became due. (p. 296.)

(*p*) This must be taken to apply only to payments which are in strictness "rent," and not to monies recoverable as rent, *e.g.*, payments under sect. 4. Neither does it apply where the relation of landlord and tenant exists only by virtue of an attornment clause under a mortgage deed, which is not a tenancy for all purposes. (*Ex parte Punnett, Re Kitchen*, 50 L. J., Ch. 212; 16 Ch. D. 226.)

(*q*) 25th August, 1883.

(*r*) Apart from the limitation here created, rent is recoverable by distress within six years after it became due. This section merely provides

that it shall not be lawful to distrain for rent more than a year old according to the customary date of payment, but within that limit allows a distress for more than a year's rent. (*Ex parte Bull, Re Bew*, 18 Q. B. D. 642; 56 L. J., Q. B. 270.)

(s) The protection to landlords afforded by this proviso is somewhat restricted by confining it to those cases where the exact quarter or half-year is allowed. Deferred payment of rent, which it is believed was in its origin allowed only in the case of Michaelmas rent (being to enable the tenant to thrash his crops and sell his grain), is now generally extended to both half-years' rent. But it is far from a general rule that the time allowed is until the exact quarter day next, or next but one, from that on which the rent becomes due, and where such exact period is not allowed, the landlord will exclude this section or exact payment of the rent for each half-year shortly after the customary credit has expired.

It has been suggested that where a longer period than the exact quarter or half-year is allowed, the end of the quarter or half-year, as the case may be, of such longer period is to be deemed the period at which the rent became due. (Woodfall, 475, 14th ed.) It was assumed in *Ex parte Bull* (*supra*), that the time of grace allowed in the ordinary course of dealing between the parties, though less than a quarter of a year, was the time at which it was to be deemed to have become due. Neither of these views seem consistent with the literal terms of the Act, since "quarter of a year" and "half a year" have a well defined legal meaning.

45. Where live stock belonging to another person (*t*) has been taken in by the tenant of a holding to which this Act applies to be fed at a fair price (*u*) agreed to be paid for such feeding by the owner of such stock to the tenant (*v*), such stock shall not be distrained by the landlord (*x*) for rent (*y*) where there is other sufficient distress to be found (*z*), and if so distrained by reason of other sufficient distress not being found, there shall not be recovered by such distress a sum exceeding the amount of the price so agreed to be paid for the feeding, or if any part of such price has been paid exceeding the amount remaining unpaid; and it shall be lawful for the owner of such stock, at any time before it is sold, to redeem such stock by paying to the distrainer a sum equal to such price as aforesaid, and any payment so made to the distrainer shall be in full discharge as against the tenant of any sum of the like amount which would be otherwise due from the owner of the stock to the tenant in respect of the price of feeding (p. 306): Provided always, that so long as any portion of such live stock shall remain on the said holding, the right to distrain such portion shall continue to the full extent of the price originally agreed to be paid for the feeding of the whole of such live stock, or if part of such price has been bonâ fide paid to the tenant under the agreement, then to the full extent of the price then remaining unpaid.

Limitation of distress in respect of things to be distrained.

Agricultural or other machinery (*a*) which is the bonâ fide property of a person other than the tenant, and is on the premises of the tenant under a bonâ fide agreement with him for the hire or use thereof in the conduct of his business, and live stock of all kinds which is the bonâ fide property of a person other than the tenant, and is on the premises of the tenant solely for breeding purposes (*b*), shall not be distrained for rent in arrear. (p. 303.)

(*t*) Compare the Lodgers' Goods Protection Act (34 & 35 Vict. c. 79, *ante*, p. 303.)

To evidence the ownership and terms of the agistment, in case of dispute, it would be a wise precaution on the part of the owner to have a written agreement at the time the cattle are taken in. The onus of proof of ownership will be upon him.

(u) The "price" agreed to be paid need not necessarily be money, but may be an equivalent in barter, as where cattle are agreed to be agisted in return for their milk. (*London, &c. Banking Co. v. Belton*, 54 L. J., Q. B. 568; 15 Q. B. D. 457.)

The section applies only in the case of the ordinary agreement for "agistment," and not to the case of cattle on the ground under an agreement whereby the tenant allowed the owner of the cattle "the exclusive right of eating the grass of a certain field for four weeks." (*Masters v. Green*, 20 Q. B. D. 807; 59 L. T. 476.)

(v) This will not protect live stock allowed by the tenant to pasture gratuitously upon his holding, nor to horses which have been hired by him to till the land.

(x) Under an attornment clause in a mortgage, the mortgagee is entitled to distrain the chattels of a stranger. (*Kearsley v. Phillips*, 52 L. J., Q. B. 581; 31 W. R. 909.) It does not appear that this right is affected by the present section.

(y) See note (p) to sect. 44.

(z) It is submitted that "other sufficient distress" means other chattels not also conditionally exempt, and which are immediately available to satisfy the distress; and that the live stock of a stranger may be distrained, notwithstanding there are unripe growing crops upon the holding more than sufficient to satisfy the distress.

(a) This does not protect ordinary implements of husbandry lent or hired to the tenant.

(b) This will protect rams and other breeding stock, which are often hired for the season.

Remedy for
wrongful
distress under
this Act.

46. Where any dispute arises—

(a) in respect of any distress having been levied contrary to the provisions of this Act; or

(b) as to the ownership of any live stock distrained, or as to the price to be paid for the feeding of such stock; or

(c) as to any other matter or thing relating to a distress on a holding to which this Act applies (a):

such dispute may be heard and determined by the county court or by a court of summary jurisdiction, and any such county court or court of summary jurisdiction may make an order for restoration of any live stock or things unlawfully distrained, or may declare the price agreed to be paid in the case where the price of the feeding is required to be ascertained, or may make any other order which justice requires (a): any such dispute as mentioned in this section shall be deemed to be a matter in which a court of summary jurisdiction has authority by law to make an order on complaint in pursuance of the Summary Jurisdiction Acts; but any person aggrieved by any decision of such court of summary jurisdiction under this section may, on giving such security to the other party as the Court may think just, appeal to a court of general or quarter sessions. (p. 341.)

The jurisdiction given by this section is permissive, and does not prevent a resort to the superior courts.

(a) It may fairly be questioned whether the jurisdiction here conferred is not restricted to disputes touching the infringement of legal rights

conferred by the Act itself, and the words "any other matter or thing relating to a distress" limited to matters *ejusdem generis* with those before enumerated. (See *Gunnestad v. Price*, 44 L. J., Ex. 44; L. R., 10 Ex. 65.) The object of this portion of the Act is to deal with certain specific defects in the law of distress; it could never have been the intention of the legislature to impose upon courts of summary jurisdiction the assessment of damages in cases of illegal or excessive distress, or to relegate to them the decision of those delicate legal questions which often arise in such matters.

Although no express right of appeal is given from the county court, such right exists by virtue of 51 & 52 Vict. c. 43, s. 120. (See *Hanmer v. King*, 57 L. T. 367.)

47. Where the compensation due under this Act, or under any custom or contract, to a tenant has been ascertained before the landlord distrains for rent due, the amount of such compensation may be set off against the rent due, and the landlord shall not be entitled to distrain for more than the balance. (pp. 273, 289.)

Set-off of compensation against rent.

This section can only be of limited application. A landlord will seldom postpone his distress until the compensation is ascertained.

48. An order (b) of the county court or of a court of summary jurisdiction under this Act shall not be quashed for want of form, or be removed by certiorari or otherwise into any superior court. (p. 341.)

Exclusion of certiorari.

(b) This does not prevent the removal of the proceedings before order made.

[Sects. 49 to 52 inclusive are repealed by sect. 9 of the Law of Distress Amendment Act, 1888. See Appendix (C).]

PART III.

General Provisions.

53. This Act shall come into force on the 1st day of January, 1884, which day is in this Act referred to as the commencement of this Act. (p. 414.)

Commencement of Act.

54. Nothing in this Act shall apply (f) to a holding that is not either wholly agricultural, or wholly pastoral (p. 415), or in part agricultural, and as to the residue pastoral, or in whole or in part cultivated as a market garden (p. 415), or to any holding let to the tenant during his continuance in any office, appointment, or employment (pp. 13, 414) held under the landlord.

Holdings to which Act applies.

(f) An objection to the jurisdiction, or that the Act does not apply, should, whether in the case of a reference or in proceedings before a county court or court of summary jurisdiction, be taken at the outset of the proceedings, otherwise the objection will be taken to be waived. (*Re Hick*, 8 Taunt. 694; *Hamlyn v. Bettsley*, 50 L. J., Q. B. 1; 6 Q. B. D. 63. And see note (b) to sect. 9.)

55. Any contract, agreement, or covenant made by a tenant, by virtue of which he is deprived of his right to claim compensation

Avoidance of agreement

inconsistent
with Act.

under this Act in respect of any improvement mentioned in the first schedule hereto (except an agreement providing such compensation as is by this Act permitted to be substituted for compensation under this Act (g)), shall, so far as it deprives him of such right, be void both at law and in equity. (p. 416.)

(g) See sects. 3, 4 and 5.

Right of
tenant in
respect of
improvement
purchased
from outgoing
tenant.

56. Where an incoming tenant has, with the consent in writing of his landlord, paid to an outgoing tenant any compensation payable under or in pursuance of this Act in respect of the whole or part of any improvement, such incoming tenant shall be entitled on quitting the holding to claim compensation in respect of such improvement or part in like manner, if at all, as the outgoing tenant would have been entitled if he had remained tenant of the holding, and quitted the holding at the time at which the incoming tenant quits the same. (p. 420.)

Compensation
under this
Act to be
exclusive.

57. A tenant shall not be entitled to claim compensation by custom or otherwise than in manner authorized by this Act (p. 417) in respect of any improvement for which he is entitled to compensation under or in pursuance of this Act, but where he is not entitled to compensation under or in pursuance of this Act he may recover compensation under any other Act of Parliament, or any agreement or custom, in the same manner as if this Act had not passed. (pp. 408, 417.)

See note (x) to sect. 7.

Provision as
to change of
tenancy.

58. A tenant who has remained in his holding during a change or changes of tenancy shall not thereafter on quitting his holding at the determination of a tenancy be deprived of his right to claim compensation in respect of improvements by reason only that such improvements were made during a former tenancy or tenancies, and not during the tenancy at the determination of which he is quitting. (p. 420.)

Restriction
in respect of
improvements
by tenant
about to quit.

59. Subject as in this section mentioned, a tenant shall not be entitled to compensation in respect of any improvements, other than manures as defined by this Act (h), begun by him, if he holds from year to year, within one year before he quits his holding, or at any time after he has given or received final notice to quit, and, if he holds as a lessee, within one year before the expiration of his lease.

A final notice to quit means a notice to quit which has not been waived or withdrawn (i), but has resulted in the tenant quitting his holding.

The foregoing provisions of this section shall not apply in the case of any such improvement as aforesaid :

- (1) Where a tenant from year to year has begun such improvement during the last year of his tenancy, and, in pursuance of a notice to quit thereafter given by the landlord, has quitted his holding at the expiration of that year; and
- (2) Where a tenant, whether a tenant from year to year, or a lessee, previously to beginning any such improvement, has served notice on his landlord of his intention to begin the same,

and the landlord has either assented or has failed for a month after the receipt of the notice to object to the making of the improvement. (p. 420.)

(h) Numbers 22 and 23 in the schedule. (Sect. 61.)

(i) When a proper notice to quit is given it determines the tenancy. Its subsequent waiver or withdrawal creates a new tenancy commencing from the expiration of the old one.

60. Except as in this Act expressed, nothing in this Act shall take away, abridge, or prejudicially affect any power, right, or remedy of a landlord, tenant, or other person vested in or exercisable by him by virtue of any other Act or law, or under any custom of the country, or otherwise, in respect of a contract of tenancy or other contract, or of any improvements, waste, emblements, tillages, away-going crops, fixtures, tax, rate, tithe rent-charge, rent, or other thing. (pp. 408, 417.)

General
saving of
rights.

See note (b) to sect. 1.

61. In this Act:

Interpreta-
tion.

"Contract of tenancy" means a letting of or agreement for the letting land for a term of years, or for lives, or for lives and years, or from year to year; (p. 415.)

A tenancy from year to year under a contract of tenancy current at the commencement of the Act shall for the purposes of this Act be deemed to continue to be a tenancy under a contract of tenancy current at the commencement of this Act until the first day on which either the landlord or tenant of such tenancy could, the one by giving notice to the other immediately after the commencement of this Act, cause such tenancy to determine, and on and after such day as aforesaid shall be deemed to be a tenancy under a contract of tenancy beginning after the commencement of this Act; (j) (p. 418.)

"Determination of tenancy" means the cesser of a contract of tenancy by reason of effluxion of time, or from any other cause; (p. 417.)

"Landlord" in relation to a holding means any person for the time being entitled to receive the rents and profits of any holding; (k)

"Tenant" means the holder of land under a landlord for a term of years, or for lives, or for lives and years, or from year to year; (p. 415.)

"Tenant" includes the executors, administrators, assigns, legatee, devisee, or next of kin, husband, guardian, committee of the estate or trustees in bankruptcy of a tenant, or any person deriving title from a tenant; and the right to receive compensation in respect of any improvement made by a tenant shall enure to the benefit of such executors, administrators, assigns, and other persons as aforesaid; (p. 417.)

"Holding" means any parcel of land (l) held by a tenant; (p. 414.)

"County court," in relation to a holding, means the county court within the district whereof the holding or the larger part thereof is situate;

“Person” includes a body of persons and a corporation aggregate or sole;

“Live stock” includes any animal capable of being distrained; (*m*)

“Manures” means any of the improvements numbered twenty-two and twenty-three in the third part of the first schedule hereto; (p. 420.)

The designations of landlord and tenant shall continue to apply to the parties until the conclusion of any proceedings taken under or in pursuance of this Act in respect of compensation for improvements, or under any agreement made in pursuance of this Act.

(*j*) See note (*i*) to sect. 5.

(*k*) Landlord does not, as in the case of a tenant, include his personal representatives. (See *Gough v. Gough*, 39 W. R. 593; [1891] 2 Q. B. 665.)

(*l*) Land, in all Acts of Parliament, unless there are words to restrict the meaning, includes houses and buildings. (52 & 53 Vict. c. 63, s. 3.)

(*m*) All animals except those *feræ naturæ* can be distrained. (Gilbert, 49; Bullen, 90.)

Repeal of
Acts of 1875
and 1876.

62. On and after the commencement of this Act, the Agricultural Holdings (England) Act, 1875, and the Agricultural Holdings (England) Act, 1875, Amendment Act, 1876, shall be repealed.

Provided that such repeal shall not affect:

(a) any thing duly done or suffered, or any proceedings pending under or in pursuance of any enactment hereby repealed; or

(b) any right to compensation in respect of improvements to which the Agricultural Holdings (England) Act, 1875, applies, and which were executed before the commencement of this Act; or

(c) any right to compensation in respect of any improvement to which the Agricultural Holdings (England) Act, 1875, applies (*n*), although executed by a tenant after the commencement of this Act if made under a contract of tenancy current at the commencement of this Act; or

(d) any right in respect of fixtures affixed to a holding before the commencement of this Act; (p. 396.)

and any right reserved by this section may be enforced after the commencement of this Act in the same manner in all respects as if no such repeal had taken place. (p. 414.)

(*n*) See *Smith v. Acock*, 53 L. T. 230.

Short title of
Act.

63. This Act may be cited for all purposes as the Agricultural Holdings (England) Act, 1883.

Limits of
Act.

64. This Act shall not apply to Scotland or Ireland.

Provision is made for Scotland by the 46 & 47 Vict. c. 62.

SCHEDULES.

FIRST SCHEDULE.

PART I. *Improvements to which Consent of Landlord is required.*

- (1.) Erection or enlargement of buildings.
- (2.) Formation of silos.
- (3.) Laying down of permanent pasture.
- (4.) Making and planting of osier beds.
- (5.) Making of water meadows or works of irrigation.
- (6.) Making of gardens.
- (7.) Making or improving of roads or bridges.
- (8.) Making or improving of watercourses, ponds, wells or reservoirs, or of works for the application of water power or for supply of water for agricultural or domestic purposes.
- (9.) Making of fences.
- (10.) Planting of hops.
- (11.) Planting of orchards or fruit bushes.
- (12.) Reclaiming of waste land.
- (13.) Warping of land.
- (14.) Embankment and sluices against floods.

PART II. *Improvement in respect of which Notice to Landlord is required.*

- (15.) Drainage.

PART III. *Improvements to which Consent of Landlord is not required.*

- (16.) Boning of land with undissolved bones.
- (17.) Chalking of land.
- (18.) Clay-burning.
- (19.) Claying of land.
- (20.) Liming of land.
- (21.) Marling of land.
- (22.) Application to land of purchased artificial or other purchased manure (a).
- (23.) Consumption on the holding by cattle, sheep, or pigs of cake or other feeding stuff not produced on the holding.

(a) Purchased manure does not include straw purchased and converted into manure. (*Brunskill v. Atkinson*, 29 Sol. J. 29.)

SECOND SCHEDULE.

[Is impliedly though not expressly repealed with sect. 49 by 51 & 52 Vict. c. 21, s. 9.]

APPENDIX (C).

51 & 52 VICT. CAP. 21.

An Act to amend the Law of Distress for Rent.

[7th August, 1888.]

BE IT ENACTED as follows :

- Short title. 1. This Act may be cited as the Law of Distress Amendment Act, 1888.
- Extent. 2. This Act shall not apply to Scotland or Ireland.
- Commence-
ment. 3. This Act, except as in this Act otherwise provided, shall come into operation from and immediately after the thirty-first day of October one thousand eight hundred and eighty-eight.
- Certain goods
exempted
from distress
as under
9 & 10 Vict.
c. 95, s. 96. 4. From and after the passing of this Act the following goods and chattels shall be exempt from distress for rent; namely, any goods or chattels of the tenant or his family which would be protected from seizure in execution under section ninety-six of the County Courts Acts, 1846, or any enactment amending or substituted for the same.
- Provided that this enactment shall not extend to any case where the lease, term, or interest of the tenant has expired, and where possession of the premises in respect of which the rent is claimed has been demanded, and where the distress is made not earlier than seven days after such demand.
- Repeal of
2 W. & M.
c. 5, s. 1,
except where
appraisement
is required in
writing. 5. So much of an Act passed in the second year of the reign of their Majesties King William the Third and Mary, chapter five, as requires appraisement before sale of goods distrained is hereby repealed, except in cases where the tenant or owner of the goods and chattels by writing requires such appraisement to be made, and the landlord or other person levying a distress may, except as aforesaid, sell the goods and chattels distrained without causing them to be previously appraised; and for the purposes of sale the goods and chattels distrained shall, at the request in writing of the tenant or owner of such goods and chattels, be removed to a public auction room or to some other fit and proper place specified in such request, and be there sold. The costs and expenses of appraisement when required by the tenant or owner shall be borne and

paid by him; and the costs and expenses attending any such removal, and any damage to the goods and chattels arising therefrom, shall be borne and paid by the person requesting the removal.

6. The period of five days provided in the said Act of William and Mary, chapter five, within which the tenant or owner of goods and chattels distrained may replevy the same, shall be extended to a period of not more than fifteen days if the tenant or such owner make a request in writing in that behalf to the landlord or other person levying the distress, and also give security for any additional cost that may be occasioned by such extension of time: Provided that the landlord or person levying the distress may, at the written request, or with the written consent, of the tenant or such owner as aforesaid, sell the goods and chattels distrained, or part of them, at any time before the expiration of such extended period as aforesaid.

Extension of time to replevy at request of tenant.

7. From and after the commencement of this Act no person shall act as a bailiff to levy any distress for rent unless he shall be authorized to act as a bailiff by a certificate in writing under the hand of a county court judge; and such certificate may be general or apply to a particular distress or distresses, and may be granted at any time after the passing of this Act in such manner as may be prescribed by rules under this Act. If any person holding a certificate shall be proved to the satisfaction of the judge of a county court to have been guilty of any extortion or other misconduct in the execution of his duty as a bailiff he shall be liable to have his certificate summarily cancelled by the said judge.

Distress to be levied by certified bailiffs.

Nothing in this section shall be deemed to exempt such bailiff from any other penalty or proceeding to which he may be liable in respect of such extortion or misconduct.

A county court registrar may exercise the power of granting certificates hereby conferred upon a county court judge in cases in which he may be authorized to do so by rules made under this Act.

If any person not holding a certificate under this section shall levy a distress contrary to the provisions of this Act, the person so levying, and any person who has authorized him so to levy, shall be deemed to have committed a trespass.

8. After the passing of this Act the Lord Chancellor may from time to time make, alter, and revoke rules—

Power to make rules.

- (1.) For regulating the security (if any) to be required from bailiffs;
- (2.) For regulating the fees, charges, and expenses in and incidental to distresses; and
- (3.) For carrying into effect the objects of this Act.

9. Sections forty-nine, fifty, fifty-one, and fifty-two of the Agricultural Holdings (England) Act, 1883, are hereby repealed from and after the commencement of this Act, but this repeal shall not affect anything done or suffered before the commencement of this Act under these sections.

Repeal.
46 & 47 Vict.
c. 61.

RULES *made pursuant to Section Eight of the Law of Distress Amendment Act, 1888.*

[August 31st, 1888.]

1. These rules may be cited as the Distress for Rent Rules, 1888.
2. Certificates granted under the Law of Distress Amendment Act, 1888, hereinafter called the Act, may be either general or special. A special certificate shall specify the particular distress or distresses to which it applies. Certificates shall be in the Forms Nos. 1 and 2 in Appendix I. to these Rules, with such variations as circumstances may require.
3. A special certificate may be granted by the judge or registrar, but a general certificate shall only be granted by the judge in person.
4. A general certificate shall authorize the bailiff named in it to levy at any place in England or Wales.
5. Any person (not being an officer of a county court) holding a certificate under the Agricultural Holdings Act, 1883, shall on application be entitled to obtain, without fee, a general certificate.
6. No certificate shall be granted to any officer of a county court.
7. Any practising solicitor of the supreme court shall, on application, and on payment of the prescribed fee, be entitled to a general or special certificate.
8. A general or special certificate may, on payment of the prescribed fee, be granted to any applicant who satisfies the authority granting the same that he is a fit and proper person to hold the certificate.
9. Where the applicant for a certificate is not a ratepayer, rated on a rateable value of not less than 25*l.* per annum, he may, if the authority applied to thinks fit, be required to give security for the due performance of his duties.
10. The security shall be security to the satisfaction of the registrar. In the case of a general certificate the amount shall be 20*l.*, and in the case of a special certificate the amount shall be 5*l.*
11. The security shall be given to the registrar. It may be given by deposit, or by bond, or by guarantee, as the registrar may think fit.
12. On any application to cancel a certificate the judge may, whether he cancels the certificate or not, order that the security shall be forfeited either wholly or in part, and that the amount directed to be forfeited shall be paid to the party aggrieved.
13. Where the judge orders that the security shall be forfeited, either wholly or in part, but does not cancel the certificate, he may direct that the bailiff shall give fresh security as a condition of retaining his certificate.
14. Subject to Rule 12, where a certificate is cancelled by the judge, the security shall also be cancelled, and the deposit (if any) returned.
15. No person shall be entitled to any fees, charges, or expenses for levying a distress, or for doing any act or thing in relation thereto, other than those specified in, and authorized by, the table in Appendix II. to these Rules.
16. Where the rent due exceeds 20*l.* the fees, charges, and ex-

penses specified in Scale I. shall be allowed, and where the rent due does not exceed 20l. the fees, charges, and expenses specified in Scale II. shall be allowed.

17. In case of any difference as to fees, charges, and expenses between the parties, or any of them, the fees, charges, and expenses shall be taxed by the registrar of the district in which the distress is levied. The registrar may make such order as he thinks fit as to the costs of such taxation.

18. A copy of the table of fees, charges, and expenses authorized by these rules shall be posted up by the registrar in a conspicuous place in his office, and every bailiff levying a distress shall, on the request of the tenant, produce to him his certificate and a copy of the table.

19. "Judge" means a judge of county courts.

"Certificate" means a certificate to act as a bailiff under section 7 of the Act.

"Registrar" means registrar of a county court, and each registrar where there is more than one, and includes a deputy registrar.

APPENDIX I.

FORM 1. GENERAL CERTIFICATE.

[Date.]

In the County Court of _____, holden at _____
 Pursuant to section seven of the Law of Distress Amendment Act, 1888, I hereby authorize *A. B.*, of _____, to act as a bailiff to levy distresses for rent in England and Wales.
 Signed _____
 (L.S.) _____ Judge.

FORM 2. SPECIAL CERTIFICATE.

[Date.]

In the County Court of _____, holden at _____
 Pursuant to section seven of the Law of Distress Amendment Act, 1888, I hereby authorize *A. B.*, of _____, to act as a bailiff to levy a distress on the premises of *C. D.*, of _____, for rent alleged to be due to *E. F.*, of _____
 Signed _____
 (L.S.) _____ Judge.
 or Registrar.

APPENDIX II. TABLE OF FEES, CHARGES, AND EXPENSES.

SCALE I.

Distresses for Rent where the Sum demanded and due shall exceed 20l.

For levying distress. Three per cent. on any sum exceeding 20l. and not exceeding 50l. Two and a half per cent. on any sum exceeding 50l. and not exceeding 200l.; and one per cent. on any additional sum.

For man in possession, 5s. per day; to provide his own board in every case.

For advertisements the sum actually and necessarily paid.

For commission to the auctioneer. On sale by auction seven and a half per cent. on the sum realized not exceeding 100l., five per cent. on the next 200l., four per cent. on the next 200l.; and on any sum exceed-

ing 500*l.* three per cent. up to 1,000*l.*, and two and a half per cent. on any sum exceeding 1,000*l.* A fraction of 1*l.* to be in all cases reckoned 1*l.*

Reasonable fees, charges, and expenses (subject to Rule 17) where distress is withdrawn or where no sale takes place, and for negotiations between landlord and tenant respecting the distress.

For appraisement, on tenant's written request, whether by one broker or more, 6*d.* in the pound on the value as appraised, in addition to the amount for the stamp.

SCALE II.

*Distresses for Rent where the Sum demanded and due shall not exceed 20*l.**

For levying distress, 3*s.*

For man in possession, 4*s.* 6*d.* per day; to provide his own board in every case.

For appraisement, on the tenant's written request, whether by one broker or more, 6*d.* in the pound on the value as appraised, in addition to the amount for the stamp.

For all expenses of advertisements, if any, 10*s.*

Catalogues, sale and commission, and delivery, 1*s.* in the pound on the net produce of the sale.

For removal at tenant's request, the reasonable expenses (subject to Rule 17) attending such removal.

TREASURY ORDER REGULATING FEES (LAW OF DISTRESS AMENDMENT ACT, 1888).

SCHEDULE.

SEPTEMBER 15TH, 1888.

The LAW OF DISTRESS AMENDMENT ACT, 1888, and the RULES made thereunder.

Fees to be taken in the following matters:—

	£	s.	d.
For every application for a general certificate	0	5	0
For every application for a special certificate	0	2	6
For approving of security by bond	0	10	6
For receiving deposit in lieu of bond	0	4	0
For taxation, where required, if the rent exceeds 20 <i>l.</i>	0	10	0
For taxation, where required, if the rent does not exceed 20 <i>l.</i>	0	5	0

ADDITIONAL RULE.

DECEMBER 7TH, 1888.

The words "officer of a county court" in Rules five and six of the Distress for Rent Rules, 1888, shall not apply to any officer who was an officer of a county court before the date of those Rules.

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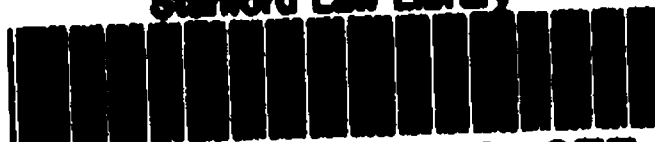
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